Petition

81-1758

No. -____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

Petitioner,

v.

MOBILE MECHANICAL CONTRACTORS ASSOCIATION, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Did the court of appeals in its disposition of a Section 303 claim err in concluding that a labor union violated Section 8(b)(4)(A) of the National Labor Relations Act by striking to compel a local employer association to adopt a contract clause conferring on a private, bi-partite tribunal half of the members of which are selected by the striking union and half by a national employer association to which the local employer association does not belong authority to arbitrate disputes concerning substantive contract terms over which the local parties have deadlocked in collective bargaining?

A. Does the phrase in Section 8(b)(4)(A) "to join any labor or employer organization" mean "to act as if [one] were a member of" such organization as well as "to become a member thereof?"

B. If it does, was the strike herein for the arbitration clause an attempt to force or require the local employer association to act as if it were a member of the national employer association that appointed one-half of the arbitrators to the private, bi-partite tribunal?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the Court whose judgment is sought to be reviewed are:

1. Mobile Mechanical Contractors Association, Inc.
2. Edward J. Carlough
3. K. C. Doby
4. Jimmy A. Hinkle
5. A. Bruce McKenzie
6. John R. Falvella
7. Sheet Metal Workers' International Association, AFL-CIO
8. Sheet Metal Workers' International Association, AFL-CIO, Local 441

Donald W. Fisher
Attorney for Petitioner

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No. -____

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

Petitioner,

v.

MOBILE MECHANICAL CONTRACTORS ASSOCIATION, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Sheet Metal Workers' International Association, AFL-CIO (Sheet Metal Workers) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on December 21, 1981.

OPINIONS BELOW

The opinion of the district court consists of Findings of Fact and Conclusions of Law entered on August 17, 1978, by the United States District Court, Southern District of Alabama, Southern Division, which are reported at 456 F.Supp. 310 (App. A) and the entry of a summary judgment against defendants as to liability, with damages to be determined by further hearings (App. B). A damage award was entered on the liability phase of the trial on February 23, 1979, assessing damages

against Petitioner in the amount of $17,000.00, (App. C) is also unreported. The opinion of the court of appeals (App. D) is reported at 664 F.2d 481 (5th Cir. 1981).

JURISDICTION

On December 21, 1981, the court of appeals entered an order (App. E) affirming in part and reversing in part a judgment against Petitioner. This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Only two statutes are involved: § 8(b)(4)(A) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4)(A) and § 303 of the Labor Management Relations Act to 1947, 29 U.S.C. 187. The pertinent portions of those statutes are as follows:

Section 8(b)(4)(A):

"b) It shall be an unfair labor practice for a labor organization or its agents —

* * *

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

"(A) forcing or requiring any employer or self-employed person to join any labor or employer orga-

nization or to enter into any agreement which is prohibited by section 8(e)."

Section 303:

"(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

STATEMENT OF THE CASE

Petitioner Sheet Metal Workers,[1] an international labor union, and Local 441,[2] one of its local union affiliates, in 1974, conducted a peaceful but unsuccessful, 14-week economic strike against Respondent, MMCA,[3] an employer association representing for purposes of collective bargaining a number of member and non-member sheet metal contractors in Southern Alabama. One of the objects of the abortive strike was to require MMCA to adopt a contract clause known as Article X, Section 8,[4] which establishes an arbitration procedure for resolving collective-bargaining impasses through a private, bi-partite tribunal known as the NJAB.[5] NJAB awards are final

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[1] Refers to Sheet Metal Workers' International Association, AFL-CIO.

[2] Refers to Local Union 441, Sheet Metal Workers' International Association, AFL-CIO.

[3] Refers to Mobile Mechanical Contractors Association, Inc.

[4] A true copy of this contract clause is reproduced in App. F.

[5] Refers to National Joint Adjustment Board for the Sheet Metal Industry.

and binding when reached by unanimous vote of the arbiters. Half of the arbiters on the NJAB are selected by Sheet Metal Workers and half by SMACNA,[6] a national employer association to which MMCA does not belong.

At no time during the abortive 14-week strike did Petitioner or Local 441 make a demand that MMCA become a member of SMACNA. They demanded only that MMCA adopt Article X, Section 8, thereby agreeing to use the impasse-resolution services of the NJAB which were available to all employers irrespective of membership or non-membership in SMACNA.

The court of appeals below affirmed the holding of the district court which held that the demand for Article X, Section 8, was actionable under § 303 in that Petitioner was striking to compel an employer "to join" an employer organization within the meaning of § 8(b)(4)(A). The court of appeals predicated its decision as to § 303 liability on its expansive construction of the statutory phrase "forcing or requiring any employer . . . to join [an] . . . employer organization" so as to include "efforts to compel an employer to act as if it were a member of an employer organization" as well as to compel the employer actually to become a member.[7] Petitioner submits that this is an overbroad and erroneous interpretation of the statutory language. The court of appeals then concluded, on the basis of factual premises without support in the record, that the strike by the Petitioner to compel MMCA to arbitrate its collective bargaining impasses before the NJAB was an attempt to compel MMCA to act as if it were a member of SMACNA.[8]

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[6] Refers to Sheet Metal and Air Conditioning Contractors' National Association, Inc.

[7] "*Frito-Lay* holds that § 8(b)(4)(A) prohibits union efforts to compel an employer to join an employer organization. We conclude that this section also prohibits union efforts to compel an employer to act as if it were a member of an employer organization." (App. D, p. 51a).

[8] The Court of Appeals decision states:

> ". . . The adjustment board [NJAB] was formed to resolve collective bargaining disputes between members of the national employers

Based on the reasoning set forth above, the court of appeals affirmed the decision of the district court on the § 303 claim, in which a jury awarded actual damages of $17,000.00 against the Sheet Metal Workers.

REASONS FOR GRANTING THE WRIT

I.

WHETHER THE PHRASE IN SECTION 8(b)(4)(A) OF THE ACT "TO JOIN ANY LABOR OR EMPLOYER ORGANIZATION" MEANS "ACTING AS IF ONE WERE A MEMBER OF SUCH ORGANIZATION" IS A QUESTION OF GREAT IMPORTANCE WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

§ 8(b)(4)(A) of the National Labor Relations Act proscribes strikes for the object of ". . . forcing or requiring any employer . . . to join any labor or employer organization . . . " The quoted language could hardly be clearer on its face. The court of appeals interpreted the words "to join" to mean not only fulfill-

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association and union locals. Although the association [MMCA] is not a member of the national employers association [SMACNA], Article X compels it to act as if it were a member and submit collective bargaining disputes it has with union locals to the adjustment board. The critical factor is that the board performs collective bargaining functions for the association as if it were a member of the national employers association. To the extent union locals make proposals to the association that parallel those gained from members of the national employers association, the association, upon reaching impasse may not decide independently to endure a strike; rather it — like a member of the national employers association — must abide by the decision of the adjustment board. And members of the national employers association on the adjustment board are likely to see little reason to free the Mobile association from provisions already contained in national contracts." (App. D, p. 53a). This finding is wholly unsupported by evidence in the record. The NJAB functions as a board of arbitration for any parties that have negotiated Article X, Section 8, into their agreement and who subsequently are at a collective bargaining impasse. *Membership in SMACNA is not and never was a precondition to access to the NJAB by any employer*. There is, moreover, no evidentiary basis for the inferrence drawn by the court of appeals below that employer arbiters appointed by SMACNA would vote to impose upon unaffiliated employers using the services of the NJAB "national" contract terms to which they are opposed. The text of Article X, Section 8 is reproduced in Appendix F.

ing the requirements for membership, i.e., actually becoming a member, but also "[acting] as if [one] were a member" of an employer organization. This expansive construction exposes labor unions to damage liability under § 303 of the Labor Management Relations Act to an extent that Congress never intended.

The issue raised in this case as to the proper interpretation of the statutory language is therefore of great importance in the private and public enforcement of federal labor law, viz, the enforcement of § 8(b)(4)(A) by the Labor Board under § 8 of the Act and by private parties through the medium of damage suits against labor organizations under § 303.

A. The Interpretation By The Court Below Of The Statutory Phrase "To Join [An] . . . Employer Organization" Is Unreasonable

The language of the statute itself should be the starting point for its interpretation. Absent a clearly expressed legislative intention to the contrary, statutory language, if clear, is ordinarily regarded as conclusive. *Consumer Product Safety Com.* v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980). Where no ambiguity appears, the clear and explicit terms of a statute are normally presumed to express the legislation intention. *U.S.* v. *American Trucking Assn.*, 310 U.S. 534 (1940). Moreover, words in a statute will, whenever possible, be interpreted in their ordinary acceptation and significance and in light of the meaning commonly attributed to them. *Jones* v. *Liberty Glass Co.*, 332 U.S. 524 (1947); *Rosenman* v. *U.S.*, 323 U.S. 658 (1945).

In addition, the meaning of particular terms in a statute, such as "to join [an] . . . employer organization" in the statute under consideration herein, is frequently ascertained by reference to other words in the same statute, in accordance with the maxim *noscitur a sociis*, so that the interpretation of the challenged

words harmonizes with the context of the statute as a whole. *Carlson* v. *Landon*, 342 U.S. 524 (1952); *Van Dyke* v. *Cordova Copper Co.*, 234 U.S. 188 (1914); *U.S.* v. *American Trucking Assn.*, supra. Under this maxim, the meaning ascribed to the phrase "to join" would be expected to be the same in connection with labor organizations and employer organizations inasmuch as § 8(b)(4)(A) proscribes concerted pressures to force or require "any employer or self-employed person to join any labor or employer organization. . . . "

How could an employer or a self-employed person "act as if he had become a member of" a labor organization? An individual or entity would either be a member or not. The criteria for ascertaining whether one has "joined" in the sense of "become a member of" a labor, an employer, a professional, or a social organization are readily ascertainable, being fixed by the particular requirements of the organization in question. The criteria for ascertaining whether one is acting as if he were a member of such an organization are, to put it blandly, imprecise and highly subjective.

1. The normal meaning of the phrase "to join . . . an . . . organization" is "to become a member of it"

Websters Second International Dictionary, Unabridged (C & G Merriam 1950) defines "join" in the context of an organization or association thusly:

> "9. to associate oneself with; to be or become connected with; to unite with; as to join a party, to join the church."

In Websters Third International Dictionary, Unabridged (C & G Merriam 1961), the definition is somewhat differently phrased, as follows:

> "2. b: to become a member of a group or organization. . . ."

The Compact Edition of the Oxford English Dictionary (Clarendon Press 1971) defines the term "joined" in the following sense:

> "3. That has joined, or become a member of, some society; received into membership."

Thus, the phrase "to join [an] . . . organization" would commonly be apprehended as meaning to comply with the requirements for membership and become a member of the organization.

2. The legislative history of the statute shows that Congress used the phrase "to join" in the sense of "to become a member."

The Eightieth Congress which enacted § 8(b)(4)(A) into law indicated that the phrase "to join any labor or employer organization" meant "to become a member of such an organization." This appears reasonably clear from the language of House Conference Report No. 510 on H.R. 3020. Report No. 510 was the last report issued by the Eightieth Congress on the 1947 labor reform legislation, and contained the full text of the bill as it was shortly thereafter enacted into law. Report No. 510 stated in pertinent part:

> ". . . The conference agreement adopts the provisions of the Senate amendment with the following changes therein:
>
> * * *
>
> '(3) Section 8(b)(4) of the conference agreement has been expanded to cover a matter which was covered by section 12 of the House bill, namely, concerted activity by a union or its agents to compel an employer or self-employed person *to become a member*'." 1 Legislative History of the Labor-Management Relations Act of 1947, 547-548, hereafter Leg. Hist. (Emphasis added).

Report No. 510 was ordered printed on June 3, 1947. It was agreed to by the Senate on June 6, 1948. 93 Cong. Rec. 6694-6695, 2 Leg. Hist. 1619-1621. No legislative history prior or subsequent to House Report 510 indicates that the

phrase "to join any labor or employer organization" meant anything other than "to become a member."

3. Courts and the Labor Board have construed the term "join any labor or employer organization" to mean to become a member of such organization.

Labor Board and court decisions dealing with the statutory phrase "to join any . . . employer organization" have uniformly interpreted it to mean "to become a member of the organization." *United Construction Workers (Kanawha Coal Operators Assn.)*, 94 NLRB 1731 (1951, affirmed sub nom *NLRB* v. *United Construction Wkrs.*, 198 F.2d 391 (4th Cir. 1952) cert. den. 344 US 876 (1952); *General Ore, Inc.*, 126 NLRB 177 (1960); *Frank J. Rooney, Inc.*, 141 NLRB 106 (1963); *Amax Coal Company*, 238 NLRB 214 (1978), enf'd *Amax Coal Co.* v. *NLRB*, 614 F.2d 872 (3d Cir. 1980), rev'd *NLRB* v. *Amax Coal Co.*, 449 U.S. 1110 (1981).

The only other § 303 case of which Petitioners are aware that dealt with the issue of a strike to compel an employer to join an employer organization is *Frito-Lay, Inc.* v. *Teamsters, Local 137*, 623 F.2d 1354 (9th Cir. 1980), cert. den. 449 U.S. 1112. The rationale of the court of appeals below was predicated on the erroneous district court interpretation of § 8(b)(4)(A) in *Frito-Lay*, 401 F.Supp. 370. The union in *Frito-Lay* struck to compel 3 separate employers to re-establish a defunct multi-employer association and thereafter bargain with the union on a multi-employer basis. The district court held that an object of the strike was to compel those employers "to join [an] . . . employer association" within the meaning of § 8(b)(4)(A) in that the statute prohibited not only strikes "to force an employer to join a formal employer organization, but also strikes when an object thereof is to force several employers to act in effect as if they belonged to such employer organization which engaged in industry-wide bargaining on their behalf." 401 F. Supp. at 376.

The Ninth Circuit affirmed in *Frito-Lay* but declined to approve the district court's holding that the statutory phrase "to join [an] . . . employer organization" was elastic enough to mean "to act as if [one] were a member thereof." The appellate court held, rather, that the § 8(b)(4)(A) proscription against attempts to force an employer "to join" an employer association included attemtps to force an employer "to join" an incipient or highly informal "organization" which had no specific membership requirements as well as attempts to force employers to join associations already in existence with formal organizational structure and rules for admission to membership. The three-employer group that the union was trying to force Frito-Lay and the other employers to reactivate in order to resume mulit-employer bargaining was viewed by the Ninth Circuit as an "employer organization" within the meaning of § 8(b)(4)(A). Therefore, the strike to compel Frito-Lay to take an active part in that group was held to be an attempt to force it "to join" an "employer organization" within the meaning of the statute. Had Frito-Lay acceded to the union's demand and in combination with the two other employers resurrected the defunct multi-employer association, it would not have "acted as if it were a member" of the multi-employer association; it *would have been* a full-scale, participating member thereof, as the other two employers would have been also.

The contrast between *Frito-Lay* and the instant case is glaring. In *Frito-Lay*, the union was attempting to force employers to form an association through which they and two other employers would actually participate in multi-employer bargaining. The instant case involves no attempt to force MMCA to form, act through, pay any dues to, or have any relationship at all to the national employer organization involved, SMACNA. Moreover, to make the contrast with *Frito-Lay* even starker, at no time did the unions in the case below demand that MMCA engage in multi-employer bargaining in conjunction with SMACNA or any other employer or employer association. If

the strike to force MMCA to use the NJAB was an attempt to force it to act "as if it were a member of SMACNA" because SMACNA appoints one-half of the members of the NJAB, it could be characterized equally as aptly as an attempt to force MMCA to act "as if it were a member of Sheet Metal Workers" since Petitioner appoints just as many arbiters as SMACNA.[9] This contention would be sheer sophistry, of course, but, with all respect, Petitioner submits that the inference is as logical as the one drawn by the court of appeals below. The attempt to force MMCA to arbitrate collective bargaining impasses before the NJAB was simply not an attempt to force it "to join" SMACNA within the meaning of § 8(b)(4)(A) and gave rise to no cause of action under § 303.

II.

THE CIRCUITS ARE IN CONFLICT ON THE ISSUE OF THE MEANING OF THE PHRASE "TO JOIN ANY LABOR OR EMPLOYER ORGANIZATION."

The decision below is the only appellate authority of which Petitioner is aware holding that the phrase in § 8(b)(4)(A) "to join any labor or employer organization" means "to act as if [one] were a member," as well as "to become a member of" an employer organization. All other appellate decisions on the issue, such as *NLRB* v. *United Construction Wkrs.*, supra; *Amax Coal Co.* v. *NLRB*, supra[10]; and *Frito-Lay, Inc.* v.

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[9] § 8(b)(4)(A) makes it an unfair labor practice for a labor organization to strike for an object of "forcing or requiring any employer . . . to join any labor . . . organization . . ." Unions on occasion have struck for this object. See *United Construction Workers (Kanauha Coal Operators Assn.)*, supra.

[10] In *Amax*, for instance, the union insisted that the employers form a new multi-employer bargaining combination known as the Peabody Group and refused to grant a 60-day extension of contract to companies that did not join the multi-employer group. (614 F. 2d at 877). An Amax negotiator was told by a union representative that "[I]f you don't get into this association, you

Teamsters, supra, have held that "to join" means "to become a member of" the organization by complying with its formal rules or procedures for acquiring membership if such exist, or, as the Ninth Circuit held in *Frito-Lay,* by participating fully in the activities of the organization if it is an incipient or informal organization without specific formal "membership" requirements.

Petitioner submits that this is the correct interpretation of the statutory language and that it is clear that Petitioner and Local 441 in the instant case by striking to obtain a bi-partite arbitration clause were not attempting to compel MMCA "to join" SMACNA. The conflict among the Circuits as to the proper interpretation of the statutory language should be clarified by this court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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are going to have problems everywhere. You know how coal miners are." (614 F. 2d at 880). The employer, Amax, refused "to join" the Peabody Group" because it felt the Group's voting procedures were unfair. (614 F. 2d at 879). Thus, in *Amax,* the union was attempting to force the employer "to join" a multi-employer bargaining association, the Peabody Group, and become an active participant in its affairs.

Appendix

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No.
74-409-H

MOBILE MECHANICAL CONTRACTORS ASSOCIATION, INC.

Plaintiff,

v.

EDWARD J. CARLOUGH, individually and as the representative of all members of the Sheet Metal Workers' International Association, K. C. DOBY, JIMMY A. HINKLE, A. BRUCE MCKENZIE, JOHN R. FALVELLA, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, an unincorporated association, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION #441, as unincorporated association

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

INTRODUCTORY STATEMENT

Since this lengthly litigation began on October 1, 1974, the complaint has been twice amended, partial summary judgment entered on December 29, 1975, and the United States Court of Appeals for the Fifth Circuit in part affirmed and in part remanded that partial summary judgment, 566 F.2d 1213 (5th Cir. 1977). As the Fifth Circuit recognized, certain issues relating to damage claims by Mobile Mechanical Contractors Association, Inc. (MMCA) remain pending, and careful consideration of these claims may be aided by a brief statement of the underlying basis for each of these claims.

MMCA seeks damages in its Third, Fourth, Fifth, and Seventh Causes of Action. Damages are sought against Carlough and the Sheet Metal Workers' International Association (SMWIA); no damages are sought against the other union defendants, Doby, Hinkle, and Sheet Metal Workers International Association Local Union No. 441 (Local 441).

The Third Cause of Action seeks damages against Carlough and SMWIA as a matter of federal law, based upon a damage remedy implied by Section 302 of the Labor Management Relations Act of 1947 (LMRA), as amended, 29 U.S.C. § 186. This Cause of Action would therefore depend upon, first, whether a violation of Section 302 has taken place; and, second, whether a damage remedy is implied under the analysis of the United States Supreme Court set out in *Cort* v. *Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). The U.S. Court of Appeals for the Third Circuit recognized such implied damage remedy for violation of Section 302 in *Nedd* v. *United Mine Workers*, 556 F.2d. 190 (3d Cir. 1977). There is also a question, recognized but not decided by the Fifth Circuit, whether this court may assert jurisdiction over the Third Cause of Action under 28 U.S.C. § 1337, as an action "arising under" an act of Congress regulating commerce.

The Fourth Cause of Action presents pendent state law claims against Carlough and SMWIA, and the Fifth Cause of Action presents a diversity claim under state law against Carlough individually and as representative of members of SMWIA, pursuant to Rule 23.2, F.R.Civ.P. MMCA has argued that, whether or not a damage remedy is implied by federal law for violation of Section 302, Alabama state law gives a damage remedy for a person injured by wrongful interference with its lawful business. MMCA also seeks punitive damages in the Fourth and Fifth Causes of Action. MMCA has argued that Alabama law has long recognized that a person injured in his person or property by breach of a duty imposed by law may recover damages, Ala. Constitution of 1901, Art. I, Sec. 13. Specifically, MMCA argues a claim based upon the Alabama tort of wrongful interference with a lawful occupation, on the basis that defendants Carlough and SMWIA caused a strike for SASMI which violated Section 302, and which resulted in injury to MMCA.

The Third, Fourth, and Fifth Causes of Action each depend upon a determination that MMCA was injured by activity of defendants Carlough and SMWIA that violated Section 302. Therefore the lawfulness of the activites of Carlough and SMWIA under Section 302 is a critical underlying question in each such cause of action.

The Seventh Cause of Action rests on a different theory, and different jurisdictional basis. MMCA asserts under the Seventh Cause of Action that it is entitled to damages under Section 303 of the LMRA, 29 U.S.C. § 187, which gives a cause of action in federal court to anyone injured by a violation of Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4). MMCA asserts that Carlough and SMWIA violated Section 8(b)(4)(A), 29 U.S.C.§ 158(b)(4)(A), by efforts to force MMCA to join an "employer organization" within the meaning of Section 8(b)(4)(A). A damage action under Section 303 by an employer allegedly forced to act as if it joined an employer organization within the meaning of Section 8(b)(4)(A) has been upheld in *Frito-Lay, Inc.* v. *Teamsters*, 401 F.Supp. 370 (N.D. Cal. 1975); and damages were awarded in that case after trial. *Frito-Lay, Inc.* v. *Teamsters*, 94 LRRM 3047 (March 26, 1976 and February 8, 1977).

MMCA has argued that the demand for SASMI necessarily included as a condition of SASMI that MMCA agree to Article X, Section 8, of the SMWIA "Standard Form of Union Agreement" (MMCA Exhibit 33, 10/8/74). Article X, Section 8, would provide for determination of subsequent contract terms by the "National Joint Adjustment Board," which is composed of representatives of SMWIA and representatives of Sheet Metal and Air Conditioning Contractors' National Association (SMACNA). MMCA has argued that SMACNA is an employer organization, and the demand for SASMI included a demand for Article X, Section 8, which thereby violated Section 8(b)(4)(A) as an effort to force MMCA to join an "employer organization." MMCA further argued that Section 8(b)(4)(A) prohibits union efforts to force involuntary industry-wide bargaining and MMCA has contended that Carlough and SMWIA sought to force MMCA to engage in industry-wide bargaining with respect to SASMI.

The question of the legal sufficiency of the claims of MMCA in the Third, Fourth, Fifth, and Seventh Causes of Action appear to be issues of law, rather than issues as to which there is a disputed material fact. The amount of damages, however, appears to be a question of fact.

On March 7, 1975, the Union Defendants (Carlough, Doby, Hinkle, SMWIA, and Local 441) moved for summary judgment on all issues raised by the amended complaint, including the First, Second, Third, Fourth, and Fifth Causes of Action. After submission of briefs and due consideration of testimony at the October 8, 1974, hearing on preliminary injunction and testimony presented by defendants at the March 21, 1975 argument on summary judgment, affidavits, other evidence and arguments of counsel, this court on April 4, 1975, carried the motion for summary judgment with the case. On September 17, 1975, the court granted the motion of MMCA to amend the complaint to state the Seventh Cause of Action, a damage claim arising under Section 303 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 187. On November 21, 1975, Carlough, Doby, Hinkle, SMWIA, and Local 441 filed a motion for summary judgment as to the Seventh Cause of Action. Such motion was denied on March 26, 1976.

On December 29, 1975, this court entered partial summary judgment granting declaratory judgement as to the First and Second Causes of Action. The judgment of December 29, 1975, was appealed, and the United States Court of Appeals for the Fifth Circuit affirmed in part, and vacated in part, 566 F.2d 1213 (5th Cir. 1977).

Carlough, Doby, Hinkle, SMWIA, and Local 441, on May 10, 1978 renewed their motion for summary judgment as to the Fourth, Fifth, and Seventh Causes of Action, in light of the decision of the Fifth Circuit on appeal, 566 F.2d 1213 (5th Cir. 1977). Oral argument was heard on May 26, 1978. After due consideration of the pleadings, depositions, answers to interrogatories, affidavits, testimony at the October 8, 1974 hearing on preliminary injunction, testimony at the October 15, 1974 hearing on the contempt petition of MMCA, and the testimony presented by the Union Defendants at the March 21, 1975 argument on summary judgment, exhibits in evidence, and

having heard the arguments of counsel, having considered the memoranda of law filed by counsel for both sides, and having considered the applicable law, the Court finds as follows:

FINDINGS OF FACT

The Parties

1. MMCA is an incorporated employer association which represented several employers in collective bargaining negotiations with defendant Sheet Metal Workers International Association Local Union No. 41 (Local 441) from July through October, 1974. A substantial part of the business of MMCA is representing employers in negotiating and administering collective bargaining agreements (PLAINTIFF'S ANSWERS TO INTERROGATORIES, Interrogatory No. 29, February 3, 1975).

2. Defendant Carlough has been at all times material hereto, the general president of SMWIA, and a trustee of SASMI.

3. Defendant Doby has been at all times material hereto, an employee and "organizer" of SMWIA and Local 441 (Testimony of Rettig, 10/8/74, T. 37-38; MMCA Ex. 21, 22, 3/21/75).

4. Defendant Hinkle has been at all times material hereto, an employee and "organizer" of SMWIA (MMCA Ex. 19, 20, 21, 22, 3/21/75).

5. Defendant SMWIA (a) is an unincorporated association, (b) is a labor organization, and (c) is engaged in this judicial district in representing employees in the construction industry.

6. Defendant Local 441 (a) is an unincorporated association, (b) is a labor organization, and (c) is engaged in this judicial district in representing employees in the construction industry.

Others Involved

7. Air Conditioning Engineers, Inc. (a) is engaged in the construction industry, and (b) designated MMCA as its representative for the purposes of 1974 collective bargaining with Local 441.

8. Climatic Engineers, Incoporated (a) is engaged in the construction industry, and (b) designated MMCA as its representative for the purposes of 1974 collective bargaining with Local 441.

9. Coast Corporation (a) is engaged in the construction industry, and (b) designated MMCA as its representative for the purposes of 1974 collective bargaining with Local 441.

10. Mobile Refrigeration Company (a) is engaged in the construction industry, and (b) designated MMCA as its representative for the purposes of 1974 collective bargaining with Local 441.

THE SASMI 1973 TRUST AGREEMENT

11. The SASMI 1973 Trust Agreement (MMCA Ex. 1, 10/8/74) was, according to the declaration of trust, executed in "San Fransico [sic], California" on May 21, 1973 by Carlough for SMWIA and Charles Andrews who signed the declaration separately as "President, Sheet Metal Contractors Association of San Fransico [sic], Inc." and separately as "President, Valley Sheet Metal Co., Inc."

The SASMI Trustee Selection Procedure

12. According to the SASMI 1973 Trust Agreement, on May 21, 1973, Carlough on behalf of SMWIA appointed himself the "Union Trustee" of SASMI under the SASMI 1973 Trust Agreement.

13. According to the SASMI 1973 Trust Agreement, Charles Andrews, without any indication of the capacity in which he acted, appointed McKenzie the "Employer Trustee" under the SASMI 1973 Trust Agreement.

14. The signatures on the acceptance of the Trustees are attached to the SASMI 1973 Trust Agreement in the following manner:

ACCEPTANCE

We, the undersigned, do hereby agree to serve as Trustees in accordance with said Trust Agreement. We have read the said

Trust Agreement, fully understand the contents thereof and agree to comply with all its terms and provisions.

FOR UNION:	FOR EMPLOYER:
Name s/ Edward J. Carlough	Name s/ A. Bruce McKenzie
Position: General President	Position: _____
Address: 1750 New York Ave., N.W. Washington, D.C. 20006	Address: 147 Tiburon Blvd. San Rafeal, California 94901
Name _____	Name _____
Position: _____	Position: _____
Address: _____	Address: _____
Name _____	Name _____
Position: _____	Position: _____
Address: _____	Address: _____

15. On May 21, 1973, Charles Andrews, President of Valley Sheet Metal Co. and the Sheet Metal Contractors Association of San Francisco, and Carlough executed the SASMI 1973 Trust Agreement. Andrews appointed McKenzie as the employer trustee of SASMI to represent the Sheet Metal Contractors Association of San Francisco at a national level in the administration of SASMI (Deposition of Charles Andrews, p. 14, lines 8-25).

16. Andrews executed the SASMI Trust Agreement in consideration of certain promised economic concessions from Carlough, the SMWIA, and Sheet Metal Workers International Association Local Union No. 104 (MMCA Ex. 3-6, 12, 3/21/75).

17. Valley Sheet Metal Co. (Andrews' company) and the Sheet Metal Contractors Association of San Francisco agreed conditionally to pay money to SASMI in the future; an escrow account

was established at the Wells Fargo bank in San Francisco, to which some payments were made. The conditions precedent under the escrow agreement for payments to SASMI were not met. By letter dated December 24, 1974, McKenzie, as Executive Manager of the Sheet Metal Contractors Association of San Francisco, and Edward F. Kenny as Business Manager of Sheet Metal Workers International Association Local Union No. 104 advised SASMI Administrator John R. Falvella:

> Please be advised that the Collective Bargaining Agreement between Local 104 SMWIA and the Sheet Metal Contractors Association of San Francisco does *not* contain any provisions for the incorporation of the 'SASMI' program.
>
> The conditional arrangements for such participation were not met and any contributions received by the SASMI Fund were therefore premature and voluntary to assist possible administrative data processing. (MMCA Ex. 34, p. 2, 3/21/75).

The funds paid to the escrow account were to be returned to the contractors, including Valley Sheet Metal Co. (MMCA Ex. 34, 3/21/75; Ex. 25, 29 to Deposition of John R. Falvella; Deposition of Alexander Bruce McKenzie, p. 80, line 25 to p. 81, line 12; Deposition of Charles Andrews, p. 7, line 3 to p. 8, line 1; p. 17, lines 12-13).

18. On May 21, 1973, and subsequently, neither Andrews, Valley Sheet Metal Co., nor Sheet Metal Contractors Association of San Francisco was or has been an employer within the meaning of the SASMI 1973 Trust Agreement which provides in Article I, Section 1:

> The term 'Employers' as used herein shall mean any Employer in the Sheet Metal Industry who now or hereafter has or is operating under a collective bargaining agreement with a Local Union requiring periodic contributions to the National SASMI fund created by this Trust Agreement and any amendments or modifications thereof; . . . (MMCA Ex. 1, 10/8/74).

19. SASMI appears to have claimed that certain sums were due from one or more contractors represented by the Sheet Metal Contractors Association of San Francisco to SASMI. From the record it does not appear that any such disputed payments, if made, have been credited to employees pursuant to the terms of the SASMI 1973

Trust Agreement. Such payments were not made by "employers" within the meaning of the SASMI 1973 Trust Agreement, who are defined as "operating under a collective bargaining agreement with the Local Union requiring periodic contributions to the National SASMI Fund . . . " within the meaning of Article I, Section 1 of the SASMI 1973 Trust Agreement (MMCA Ex. 1, 10/8/74), because the Collective Bargaining Agreement between Local 104 SMWIA and the Sheet Metal Contractors Association of San Francisco did not contain any unconditional provisions for the incorporation of the "SASMI" program, and the conditional arrangements for such participation were not met (MMCA Ex. 34, 3/21/75).

20. Carlough and SMWIA offered the opportunity to select the first Employer Trustee of SASMI first to SMACNA (MMCA Ex. 1, 3/21/75), and then to Charles Andrews, who was president of the Sheet Metal Contractors Association of San Francisco. Carlough and SMWIA therefore exercised control over the selection of the SASMI Employer Trustee by choosing the persons entitled to select the SASMI Employer Trustee. McKenzie subsequently appointed another SASMI Employer Trustee, James McGill. McGill was suggested to McKenzie by Carlough (Deposition of McKenzie, p. 94, lines 11-27) and McGill himself wrote to thank Carlough for his selection as a SASMI Employer Trustee (Ex. 7 to Deposition of McKenzie).

21 The SASMI 1973 Trust Agreement established different methods for the selection and removal of Employer Trustees than the SASMI 1973 Trust Agreement established for the selection and removal of Union Trustees. The General President of SMWIA had a continuing right under the SASMI 1973 Trust Agreement to remove and replace Union Trustees; no employer or group of employers had an equivalent right to remove and replace Employer Trustees. The SASMI 1973 Trust Agreement in Article III, Section 4, provides that the Employer Trustee was appointed for life, not removable by any employer or group of employers, and retained the sole power to choose his successor; the Union Trustee, on the other hand, was appointed by the General President of the SMWIA, could be removed at will by the General President of the SMWIA, and would be replaced by the General President of the SMWIA. That is, the

SMWIA, through its General President, had a right of recall and a right of replacement of its Union Trustee which right was afforded to no employer or group of employers. Such a right of recall and replacement in the hands of the SMWIA gave it continuing, complete control over the Union Trustee, but no employer or group of employers had such control over the Employer Trustee.

22 Under Article III, Section I, of the SASMI 1973 Trust Agreement, the number of Union Trustees and Employer Trustees was required to be equal at all times. The General President of SMWIA could have prevented the appointment of any further Employer Trustees by refusing an increase in the number of Union Trustees.

23. Under the SASMI 1973 Trust Instrument, MMCA could never participate in the selection of Employer Trustees, while SMWIA retained the right to remove and select Union Trustees at any time and from time to time.

24. The SASMI plan also allows local unions to perform numerous administrative functions such as distribution of benefit applications (Article VIII, Section 1(a) Defendants' Ex. 2, p. 53, 10/8/74) and distribution of benefit checks to employees (Article V, Section 4, Defendants' Ex. 2, p. 51, 10/8/74). Each benefit application requires certain "local union data: (to be completed by union official only)" (Ex. 43 to Deposition of McGill); "SASMI BENEFIT APPLICATION PROCEDURES" (Ex. 44 to Deposition of McGill) provides that all benefit application details, correspondence and questions shall be handled between the SASMI fund office and the local union, not the applicant, and local union officials are empowered "to eliminate benefit application requests which would be erroneously filed."

25. The local unions of SMWIA which have collective bargaining agreements giving SASMI payments are extensively involved at a local level in the administration of SASMI, but there is no similar or coordinate participation by local employer associations in such administration of SASMI.

26. The SASMI 1973 Trust Agreement failed to provide for equal representation of employers and employees in the administration of SASMI.

The SASMI "Special Incentive Benefit"

27. The attachments to the SASMI 1973 Trust Agreement which were supplied by A. Bruce McKenzie (Ex. 29 to the Deposition of McKenzie; Deposition of McKenzie, p. 53, 55-56) and identified by Charles Andrews (Ex. 8 to Deposition of Andrews; Deposition of Andrews, p. 40), provide for payment of a "special incentive benefit" to employees who are participants in SASMI and who have been fully employed (MMCA Ex. 4, 10/8/74). The "special incentive benefit" is not an unemployment benefit, nor is it reasonably related to an unemployment benefit, because it is payable only to employees who are fully employed.

SASMI Payments To SMWIA

28. SASMI Trustees, including Carlough, on July 2, 1974, paid $125,000 as "reimbursement" to SMWIA. (Response of Geoffrey Clasper on behalf of defendant Edward J. Carlough to first set of interrogatories propounded by Mobile Mechanical Contractors Association, Inc., Interrogatory No. 3, 5/1/78).

29. As of July 2, 1974, SMWIA had made payments to SASMI in the amount of $10,000, and SMWIA had made payments which SASWIA attributes to have been for the benefit of the SASMI Trust Fund or the SASMI Trustees, totaling $109,159.09, as follows (Reponse of Geoffrey Clasper on behalf of defendant Edward J. Carlough to first set of interrogatories propounded by Mobile Mechanical Contractors Association, Inc., Interrogatory Nos. 1 and 2):

To Whom	Date	Amount	Purpose
Mulholland, Hickey, Lyman	7/73 thru 12/73	$22,900.00	Legal Services
Arnold & Porter	12/7/73	1,750.00	Special Legal Tax Services
Stanley Ruttenberg & Associates	11/26/73	5,450.00	Opinion Survey Cost of
	9/12/73	1,762.35	Living Council Submission on behalf of SASMI
Martin E. Segal	11/29/72	20,000.00	Development of SASMI

To Whom	Date	Amount	Purpose
Martin E. Segal	1/5/73	1,620.53	Trust Agreement and Plan
Martin E. Segal	5/24/73	560.59	
Maurer, Fleisher & Zon	8/7/73	24,446.18	Development of Pamphlets
	5/14/74	1,369.48	and other material explaining SASMI
Advertising Novelty Co.	5/23/74	3,042.86	Manufacture of SASMI Identification Buttons
Merkle Press, Inc.	12/19/73	202.65	Designing SASMI Seal
Merkle Press, Inc.	11/21/73	4,813.36	Printing Remittance Report
Merkle Press, Inc.	9/20/73	6,156.20	Printing SASMI Booklets,
Merkle Press, Inc.	4/24/73	2,978.58	"A Plan for Stabilizing the
Merkle Press, Inc.	3/26/73	2,254.98	Sheet Metal Industry"
Merkle Press, Inc.	5/17/73	3,110.33	
Merkle Press, Inc.	1/31/74	3,370.50	
Merkle Press, Inc.	2/28/74	3,370.50	
Total as of July 2, 1974:		$109,159.09	

30. SASMI, on July 2, 1974, paid SMWIA $5,840.91 more than SMWIA's accounts showed that SMIWA had paid to, or for the benefit of, SASMI at that time.

31. Subsequently, SMWIA paid $962.75 to Merkle Press, Inc., on July 19, 1974 (Response to Geoffrey Clasper on behalf of defendant Edward J. Carlough to first set of interrogatories propounded by Mobile Mechanical Contractors Association, Inc., Interrogatory No. 2)

32. On September 11, 1975, more than one year after SASMI paid $125,000 to SMWIA, SMWIA repaid SASMI the sum of $4,878.16 (Response to Geoffrey Clasper on behalf of defendant Edward J. Carlough to first set of interrogatories propounded by Mobile Mechanical Contractors Association, Inc., Interrogatory No. 1, 5/1/78).

Article X, Section 8, Of The SMWIA "Standard Form Of Union Agreement"

33. Participation in SASMI requires that employers agree to be bound by the SMWIA "Standard Form of Union Agreement."

(Testimony of James S. Phillips, 10/8/74, T. 143-44) The SASMI 1973 Trust Agreement provides in part in Article I, Section I:

> . . . that no employer may be eligible for initial or continued participation in the National SASMI Fund unless it is a party to the Standard Form of Union Agreement . . . (MMCA Ex. 1, 10/8/74).

34. An explanatory pamphlet furnished to MMCA by Sheet Metal Workers Local 441, MMCA Ex. 4, 10/8/74, contained questions and answers concerning SASMI including the following:

> Q. Is the Standard Form of Union Agreement required under the SASMI program?
>
> A. Yes. The SASMI plan requires the adoption of the entire Standard Form of Union Agreement, including Article X.

By letter dated May 28, 1974, to James McGill (Ex. 84 to Deposition of James McGill), defendant Carlough identified as one of the "hard requirements that the International had in SASMI, . . . the use of Article X, Section 8 to settle disputes . . . "

C. A. Rettig, Business Manager and negotiator for Local 441, also stated during negotiations that Article X, Section 8, was a condition of SASMI (See the Deposition of C. R. Carroll, p. 85, line 22 — p. 86, line 4:

> It was brough out in several of the meetings about Article X, Section 8. We were, of course, opposed to that and wanted to work around that and, of course, Mr. Rettig said, "No, we had to get that in because they had to have that in there before the SASMI program."
>
> So, that was verbal as well as written in the book).

35. The "Standard Form of Union Agreement," MMCA Ex. 33, 10/8/74, includes in Article X, Section 8, the following provision:

> (a) Should the negotiations for renewal of this agreement should become deadlocked in the opinion of the Local Union or of the Local Contractors' Association, or both, notice to that effect shall be given to the office of the General President of Sheet Metal Workers' International Association and the national office of the Sheet Metal & Air Conditioning Contractors'

National Association, Inc. If the General President of Sheet Metal Workers' International Association and the Chairman of the Labor Committee of Sheet Metal and Air Conditioning Contractors' National Association believe the dispute might be adjusted without going to final hearing before the National Joint Adjustment Board, each will then designate a panel representative who shall proceed to the locale where the dispute exists as soon as convenient, attempt to conciliate the differences between the parties and bring about a mutually acceptable agreement. If such panel representatives or either of them conclude that they can not resolve the dispute, the parties thereto and the General President of Sheet Metal Workers' International Association and the national office of Sheet Metal and Air Conditioning Contractors' National Association shall be promptly so notified without recommendation from the panel representatives. Should the President of Sheet Metal Workers' International Association or the Chairman of the Labor Committee of Sheet Metal and Air Conditioning Contractors' National Association fail or decline to appoint a panel member or should notice of failure of the panel representatives to resolve the dispute be given, the parties shall promptly be notified so that either party may submit the dispute to the National Joint Adjustment Board.

The dispute shall be submitted to the National Joint Adjustment Board pursuant to the rules as established and modified from time to time by the National Joint Adjustment Board. The unanimous decision of said Board shall be final and binding upon the parties, reduced to writing, signed and mailed to the parties as soon as possible after the decision has been reached. There shall be no cessation of work by strike or lockout unless and until said Board fails to reach a unanimous decision and the parties have received written notification of its failure.

(b) Any application to the National Joint Adjustment Board shall be upon forms prepared for that purpose subject to any changes which may be decided by the Board from time to time. The representatives of the parties who appear at the hearing will be given the opportunity to present oral argument and to answer any questions raised by members of the Board. Any briefs filed by either party including copies of pertinent exhibits will also be exchanged between the parties in advance of the hearing.

(c) The National Joint Adjustment Board shall have the right to establish time limits which must be met with respect to each and every step or procedure contained in this section. In addi-

tion, the President of SMWIA and the Chairman of the National Labor Committee of SMACNA shall have the right to designate time limits which will be applicable to any particular case and any step therein which may be communicated to the parties by mail, telegram, or telephone notification.

(d) Unless a different date is agreed upon mutually between the parties or is directed by the unanimous decision of the National Joint Adjustment Board, all effective dates in the new agreement shall be retroactive to the date immediately following the expiration date of the expiring agreement.

36. Article X, Section 8, of the "Standard Form of Union Agreement," MMCA Exhibit 33, 10/8/74, provides that new contract terms may be fixed by agreement of the National Joint Adjustment Board, consisting of representatives of defendant SMWIA and of SMACNA. *See* N.L.R.B. v. Sheet Metal Workers, Local 38, 575 F.2d 394 (2d Cir. 1978), discussing Article X, Section 8.

37. MMCA is not affiliated with SMACNA (Deposition of SMACNA Executive Vice President Ronald E. Van Gelderen, p. 143; Deposition of C. R. Carroll, p. 113; Deposition of Bradley Donaghey, p. 17).

Bargaining Demands For SASMI

38. Carlough and SMWIA adopted SASMI as a "priority bargaining target" for all local unions of SMWIA, including Local 441. Carlough, by correspondence (MMCA Ex. 6, 7, 10/8/74; MMCA Ex. 8, 10, 11, 3/21/75) and through his agents including International Representative Tom Reed (MMCA Ex. 2, 15, 17, 3/21/75) and defendants Hinkle and Doby, who were SMWIA "organizers" (MMCA Ex. 19, 20, 21, 22, 3/21/75), encouraged and caused Local 441 to insist upon SASMI in 1974 negotiations with MMCA. In connection with the demand for SASMI, Carlough and SMWIA also encouraged SMWIA local unions, including Local 441, to sign "interim agreements" with "independent contractors" to obtain "a very strong union weapon in strike situations" (MMCA Ex. 6, 10/8/74). The "interim agreement" suggested by Carlough and SMWIA, provided that the signatory employers agree to accept, retroactively, whatever contract terms a particular contractors' association ultimately agrees to (MMCA Ex. 6, 10/8/74).

39. Air Conditioning Engineers, Inc., Climatic Engineers, Incorporated, Coast Corporation, and Mobile Refrigeration Company and other employers represented by MMCA for the purpose of bargaining with Local 441, were parties to a collctive bargaining agreement which became effective on July 16, 1972 and which provides that it will "remain in full force and effect through July 15, 1974 . . . unless written notice of reopening is given" and provides that "this Agreement shall continue in force and effect until conferences relating thereto have been terminated by either party."

40. Local 441 gave timely notice on reopening.

41. Conferences between the collective bargaining committees of MMCA and Local 441 commenced on June 17, 1974, and continued on several occasions thereafter until agreement was reached on October 16, 1974.

42. The members of Local 441 did not, prior to entry of preliminary injunction on October 11, 1974, have an opportunity to vote as to whether they desired SASMI to be included in their collective bargaining agreement, and there is no evidence that the demand for SASMI was ever presented to the membership of Local 441 for a vote. The demand for SASMI was withdrawn by a letter frm C. A. Rettig of Local 441 to the President of MMCA dated October 14, 1974 (Local 441 Ex. 1, 10/15/74), after the preliminary injnction issued October 11, 1974, and at the time of explicit instructions from Carlough to withdraw SASMI covveyed by telegram (Testimony of Rettig, 10.15.74, T. 27, 29-30; International Union Ex. 1, 10/15/74).

43. Local 441 from June 17, 1974 until after preliminary injunction issued on October 11, 1974, demanded that employers represented by MMCA agree to contribute money to SASMI as a prerequisite to a new collective bargaining agreement to become effective as of July 16, 1974, between Local 441 and MMCA.

44. Local 441 from June 17, 1974 until after preliminary injunction issued on October 11, 1974, demanded that MMCA appoint McKenzie as the Trustee for MMCA under the SASMI 1973 Trust Agreement.

45. On July 16, 1974, Carlough, C.A. Rettig, Doby, Hinkle, John R. Falvella (a defendant dismissed from this action on July 21, 1975), SMIWA and Sheet Metal Workers Local 441, caused employees represented by Local 441 to commence a strike against Air Conditioning Engineers, Inc., Climatic Engineers, Incorporated, Coast Corporation, and Mobile Refrigeration Company and other employers (MMCA Ex. 6, 10.8.74). Carlough and SMIWA encouraged and assisted the strike for SASMI by correspodence (Testimony of Rettig, 10/8/74, T. 39-40), by payments of money (Testimony of Rettig, 10/8/74, T. 37), and by the direct involvement of SMWIA organizers Doby and Hinkle, who reported to SMWIA (MMCA Ex. 19, 20, 21, 22, 3/21/75), and were under the direction and supervision of Carlough (SMWIA Constitution and Ritual, Article Eight (8), Sec. 3, Ex. 1 to Affidavit of Conrad A. Rettig, March 7, 1975).

46. The strike of Local 441 which commenced on July 16, 1974, continued until agreement was reached on a new contract on October 16, 1974 (See Affidavit of Conrad A. Rettig, March 7, 1975).

47. Counsel stipulated, and the Court finds, that an object of the strike by Local 441 from its inception until after preliminary injunction issued on October 11, 1974, was to force and require employers represented by MMCA and other employers, to agree to participate in SASMI (Stipulations of Counsel, T. 12-13, 10/8/74).

48. Participation in SASMI by employers represented by MMCA and other employers required (a) agreement to pay money to SASMI, and (b) appointment of McKenzie as the trustee of such employers under the SASMI 1973 Trust Agreement.

49. C. A. Rettig, Business Manager of Local 441, saw a copy of the executed 1973 Trust Agreement establishing SASMI for the first time, while on the witness stand on October 8, 1974; this copy was incomplete in that it did not have the attachments referred to therein.

50. MMCA was injured by the strike and repeated demands for SASMI, and efforts to induce employers represented by MMCA to withdraw and terminate their association with MMCA by execut-

ing interim "retroactive" agreements withLocal 441 (Testimony of Max Mutchnick, 10/8/74, T. 118, 123-124; MMCA Ex. 22, 23, 24, 26, 27, 32, 10/8/74). The demand for SASMI as a condition of any agreement between MMCA and Local 441, together with the lawful resistance of MMCA to that demand, resulted in a lengthy strike during which at least two employers, James B.Donaghey, Inc. and Air Comfort Company, withdrew from representation by MMCA (Testimony of Mutchnick, 10/8/74, T. 118, 123-24; Testimony of Rettig, 10/15/74, T. 39).

51. MMCA incurred legal fees in its efforts to end the strike and to resist the demand for SASMI made by Local 441.

52. MMCA was impeded in its lawful business of negotiating on behalf of employers by the action of Carlough and SMWIA in causing and directing the strike for SASMI, and continued insistence that MMCA agree to SASMI in 1974 collective bargaining negotiations.

53. The 1974 strike by Local 441 caused a curtailment of the operations of Air Conditioning Engineers, Inc., Climatic Engineers, Incorporated, Coast Corporation, Mobile Refrigeration Company and other employers in the states of Alabama, Florida and Mississippi; caused Air Conditioning Engineers, Inc., Climatic Engineers, Incorporation, Coast Corporation, and Mobile Refrigeration Company and other employers immediate and irreparable injuries, loss and damages.

54. It was the intention of Carlough and SMWIA to impose SASMI on an industry-wide basis (MMCA Ex. 6, 10/8/74); and counsel for SASMI represented to the Internal Revenue Service in MMCA Ex. 14, 3/21/75, that SASMI will eventually encompass the entire unionized sheet metal industry:

> The [SASMI] plan has already been inaugurated in May of this year [1973], and will ultimately encompass the entire union-organized part of the sheet metal industry in which approximately 100,000 individuals are employed.

55. SMWIA and Carlough have encouraged and caused local unions of SMWIA, including Local 441, to insist that sheet metal

industry employers agree to SASMI on an industry-wide basis (MMCA Ex. 7, p. 3, 10/8/74; MMCA Ex. 2, 8, 9, 10, 11, 13, 14, 17, 18, 19, 23, 24, 25, 26, 27, 28, 3/21/75).

CONCLUSIONS OF LAW

The Federal Damage Claim Contained In The Third Cause Of Action

1. The Third Cause of Action seeks damages from Carlough and SMWIA for violation of Section 302.

2. This court has no jurisdiction of the Third Cause of action under Subsection 302(e), in accordance with the decision of the Fifth Circuit on prior appeal of this case. *Mobile Mechanical Contractors Ass'n, Inc.* v. *Carlough*, 566 F.2d 1213, 1220 (5th Cir. 1977).

3. The Fifth Circuit did not decide whether this court has jurisdiction of the Third Cause of Action under 28 U.S.C. § 1337, but that Court did note that such jurisdiction may, in this Court's discretion, be invoked. 566 F.2d at 1220. 28 U.S.C. § 1337 confers original jurisdiction on the United States district courts of actions "arising under" laws of the United States regulating commerce.

4. Section 302 of the LMRA Is a law of the United States regulating commerce within the meaning of 28 U.S.C. § 1337. *Moglia* v. *Geoghegan*, 403 F.2d 110, 112 (2d Cir. 1968), *cert. denied*, 394 U.S. 919, 89 S.Ct. 1193, 22 L.Ed.2d 453 (1969). *See also Avco Corp.* v. *Aero Lodge 735, IAM*, 390 U.S. 557, 561-62; 88 S.Ct. 1235, 1238, 20 L.Ed.2d 126 (1968).

5. MMCA is an association of employers within the meaning of Section 302 and is entitled to sue under Section 303 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 187.

6. Defendant Carlough is a representative of employees within the meaning of Section 302 and is an agent of SMWIA, a labor organization within the meaning of Section 2(5) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(5).

7. Defendant SMWIA is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act, as amended,

29 U.S.C. § 152(5); is engaged in this judicial district in representing employees in an industry affecting commerce as defined in Section 2(7) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(7); and is a representative of employees within the meaning of Section 302.

8. Defendant Local 441 is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(5); is engaged in this judicial district in representing employees in an industry affecting commerce as defined in Section 2(7) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(7); and is a representative of employees within the meaning of Section 302.

9. Air Conditioning Engineers, Inc. is an employer within the meaning of Section 302; is engaged in commerce within the meaning of Section 2(6) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(6); and is engaged in an industry affecting commerce within the meaning of Section 2(7) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(7).

10. Climatic Engineers, Incorporated is an employer within the meaning of Section 302; is engaged in commerce within the meaning of Section 2(6) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(6); and is engaged in an industry affecting commerce within the meaning of Section 2(7) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(7).

11. Coast Corporation is an employer within the meaning of Section 302; is engaged in commerce within the meaning of Section 2(6) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(6); and is engaged in an industry affecting commerce within the meaning of Section 2(7) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(7).

12. Mobile Refrigeration Company is an employer within the meaning of Section 302; is engaged in commerce within the meaning of Section 2(6) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(6); and is engaged in an industry affecting commerce

within the meaning of Section 2(7) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(7).

13. The employees of Air Conditioning Engineers, Inc., Climatic Engineers, Incorporated, Coast Corporation and Mobile Refrigeration Company and other employers represented by MMCA for the purpose of bargaining with Sheet Metal Workers Local 441, are employed in an industry affecting commerce within the meaning os Section 302 and Section 2(7) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(7).

14. SASMI is a representative of employees who are employed in an industry affecting commerce within the meaning of Section 302, and is administered at least in part by Union Trustees who are representatives of employees who are employed in an industry affecting commerce within the meaning of Section 302. *Local 2, Plasterers* v. *Parmount Plastering, Inc.*, 310 F.2d 179 (9th Cir. 1962), *cert. denied* 372 U.S. 944, 83 S.Ct. 935, 9 L.Ed.2d 969 (1963).

SASMI Violation Of The Equal Representation Requirement

15. From its inception through October 16, 1974, SASMI did not satisfy the equal representation requirement of Subsection 302(c), in that employers were not equally represented in the administration of SASMI. Carlough and SMWIA participated to an impermissible degree in the selection of employer representatives, by allowing Andrews to appoint McKenzie irrevocably and subsequently offering potential contributing employers only the opportunity to forego representation by accepting irrevocably McKenzie as the SASMI "Employer" Trustee. Carlough andf SMWIA thus chose the person entitled to choose the SASMI Employer Trustee. The equal representation requirement of Section 302 would be meaningless if a union were entitled to select certain noncontributors to irrevocably choose the Employer Trustee while the employers who actually make contributions to such fund were represented only by irrevocably designating the incumbent Employer Trustee appointed by a noncontributor.

16. The purposes of Section 302 were well stated in *Bricklayers Local 15* v. *Stuart Plastering Co., Inc.*, 512 F.2d 1024 (5th Cir. 1975):

> The design of Section 302 discloses two basic Congressional concerns. First, Congress intended to subject to close regulation the administration of union funds providing employee fringe benefits such as pensions and health and welfare payments. Congress wished to remove these funds from the absolute control of union officials by giving employers a co-ordinate responsibility for their administration. Second, Congress intended to prohibit special payments by employers and employer associations to employees, employee organizations and officers of such organizations, except on conditions carefully prescribed by law [footnotes omitted].

17. The legislative history of the Labor Management Relations Act of 1947 demonstrates an intention that employers have and exercise co-ordinate responsibility in administration of the funds to which they contribute. Senator Taft stated:

> This amendement [Section 302] provides that the employees and employers must be equally represented in the administration of the fund, together with such neutral persons as they may agree upon. In the event of a deadlock the agreement shall be submitted to an impartial umpire.
>
> The purpose is to prevent the abuse of welfare funds. Legislative History of the Labor Management Relations Act, 1947, Volume 2, at 1312 (1948), (hereafter cited II Leg. His. ____ .)

18. Opponents of Section 302 explicitly recognized the responsibility of employers. Senator Murray stated:

> . . . this amendment is designed to *compel joint administration by the union and the employer of any health and welfare fund voluntarily established between the parties* for the benefit of the employees (emphasis supplied) II Leg. His. 1316 (1948).

Senator Morse stated:

> . . . employees and employers must be equally represented in the administration of the fund, and in the event of disagreement between them, machinery is provided for the settling of such disputes. In other words, it *requires employer participation* in the funds and in the administration of the funds (emphasis supplied) II Leg. His. 1317, 1318 (1948).

19. As Professor Archibald Cox wrote of the restrictions imposed on trust funds by Section 302, "the provisions dealing employer contributions to union trust funds set the employer up as watchdog, although it has no interest in the fund." Cox, *Some Aspects of the Labor Management Relations Act*, 61 *Harv. L. Rev.* 274, 314 (1948).

20. The nature of representation contemplated by Congress in enacting Section 302 was the exercise of oversight by representatives of employers to prevent the abuse that would be possible if funds were left to union control. *See Arroyo* v. *United States*, 359 U.S. 419, 426; 79 S.Ct. 864, 868; 3 L.Ed.2d 915 (1959).

21. MMCA would not have been represented in any meaningful sense in the administration of SASMI. The responsibility of MMCA to oversee the administration of jointly administered employee welfare benefit funds to which it contributes, would not have been met by designating irrevocably McKenzie as the SASMI Employer Trustee. To do so would be to allow Carlough and SMWIA to dictate the SASMI Employer Trustee selection of MMCA. To allow the union to participate in any degree in the selection of employer trustees is unlawful under Section 302. *Blassie* v. *Kroger Co.*, 345 F.2d 58, 72 (8th Cir. 1965); *Quad City Builders Association* v. *Tri City Bricklayers Union No. 7, AFL-CIO*, 431 F.2d 999, 1003 (8th Cir. 1970).

22. The intent of Section 302 is not served if *any* contributing employer is deprived of representation in the administration of funds to which it contributes. As Justice (then Judge) Blackmun wrote in *Blassie, supra* at 72:

> *The whole contemplation of the statute* [Section 302] *is that the employers who are entitled to representation in the administration of the fund are those who make their contributions because of their subjectability to collective bargaining with the union as a union*. If others not in this category choose to contribure [such as the union on behalf of its employees or the trust on behalf of its employees], they take their representation as they find it. Further, *to permit the union in any degree to participate in the choice of employer representative does violence to the statutory standard of equal representation* [emphasis supplied].

23. Carlough and SASMI granted the right to select the SASMI Employer Trustee, McKenzie, to a noncontributor and subsequently insisted that potential contributing employers such as MMCA agree to designate irrevocably the SASMI Employer Trustee selected by noncontributors. Carlough participated in the selection of McGill as a SASMI Employer Trustee. To permit a union to select which employers are entitled to representation in the administration of an employee benefit plan, and which employers are not entitled to representation violates Section 302, because the union thereby participates to an impermissible degree in the selection of employer trustees by choosing the choosers of the trustees. Moreover, participation by Carlough in the selection of McGill as a SASMI Employer Trustee also violated Section 302.

24. The SMWIA, through its general president, had the continuing right to remove and replace the SASMI Union Trustee, although no employer had the right to remove or replace the SASMI Employer Trustee.

25. The right of recall of the Union Trustee which is not matched by the same right or recall as to the Employer Trustee does not provide equal representation of employers and employees in the administration of SASMI. *See Kroger Co.* v. *Blassie*, 225 F.Supp. 300 (D.C.Mo. 1964), *vacated and remanded with directions on other grounds*, 345 F.2d 58 (8th Cir. 1965), which disapproved a provision for alternate trustees for employees without making similar provision for alternate trustees for employers. That court

> would have required that the same standards with respect to alternate trustees must apply to both sets of trustees, as the Act provides in the representation of employers and employees with respect to the operation of the trust shall be equal. The court would also have required the removal provision regarding employer trustees [that the removal of employer trustees could be only for substantial cause] be deleted.

225 F.Supp. at 312.

26. The same rules must apply to both sets of trustees, and under the SASMI 1973 Trust Agreement they clearly do not.

27. The extensive delegation of administrative functions concerning forms, applications, and other information (in connection with SASMI) to local unions of SMWIA, without coordinate participation by representatives of local employer associations violates Section 302(c)(5)(B), in that employers are not equally represented in the administration of the Fund on the local level. The equal representation requirement of Section 302 is not satisfied simply by equal numbers of employer and employee trustees, as the fifth Circuit stated in *Costello* v. *Lipsitz*, 547 F.2d 1267, 1278 (5th Cir. 1977):

> . . . Although we wish to emphasize that none of the flagrant, impermissible abuses which gave birth to § 302 have occurred in this case, our decision is based upon the recognition that § 302 would be eviscerated should the phrase 'employees and employers are equally represented in the administration of such fund' connotate *only* the requirement that employees and employers have equal numbers of trustees, three each in this case, or representatives, [emphasis in original] [footnote omitted].

The reasoning of *Costello* v. *Lipsitz* that one group of trustees could not lawfully have sole control of any element of fund administration (in that case, sole control of fund employee hiring and compensation) is applicable to exclusive local union participation in certain SASMI administrative matters without equal representation of local employer associations.

SASMI Unlawful Benefits

28. Section 302 permits jointly administered trust funds to be organized only for purposes recognized in the statutory exceptions of Subsection 302(c). *Local 2, Plasterers* v. *Paramount Plastering, Inc.*, 310 F.2d 179 (9th Cir. 1962), *cert. denied* 372 U.S. 944, 83 S.Ct. 935, 9 L.Ed.2d 969 (1963). Strict compliance with the terms of Section 302(c) is required to establish a qualifying trust. *Bricklayers Local 15* v. *Stuart Plastering Co., Inc.*, 512 F.2d 1017 (5th Cir. 1975). The SASMI "special incentive benefit" is a type of payment not permitted by Subsection 302(c). The types of benefits which may be paid by trust funds established under Subsection 302(c) are narrowly limited, and include "unemployment" benefits. While most of the SASMI benefits appear to be "unemployment" benefits, the

"special incentive benefit" is paid only to persons relatively fully employed, and is therefore not an unemployment benefit. The SASMI "special incentive benefit" is not a permissible benefit under Subsection 302(c), and SASMI therefore does not comply with Subsection 302(c).

Unlawful Payment To SMWIA By SASMI

29. Section 302 prohibits payments to representatives of employees, such as SMWIA, and likewise prohibits the use of trust funds to make payments to representatives of employees which would violate Section 302 if made directly. *See Haley* v. *Palatnik*, 509 F.2d 1038, 1042 (2d Cir. 1975). SASMI violated Section 302 by unlawfully paying $125,000 to SMWIA On July 2, 1974, which exceeded by $5,840.91 the total payments as of that date claimed by or arguably owed to SMWIA which SMWIA attributed to be for the benefit of SASMI. Without deciding whether payment by SASMI to SMWIA of all or any part of the SMWIA expenditures (which SMWIA attributed to be for the benefit of SASMI) was lawful, the *overpayment* of $5,840.91 was clearly unlawful. The subsequent repayment, almost one year after this suit was filed, did not retroactively cure the defect which existed from July 2, 1974 through October 16, 1974.

30. Carlough, Doby, Hinkle, SMWIA and Local 441, since on or before July 15, 1974, have acted individually and in concert to demand that MMCA agree on behalf of employers represented by MMCA to make unlawful payments to SASMI in violation of Section 302. The strike in support of that demand likewise violated Section 302, and MMCA incurred damages as a result of that unlawful strike.

28 U.S.C. § 1337 Jurisdiction

31. The complaint, as amended, does not plead 28 U.S.C. § 1337 as a basis for jurisdiction of the Third Cause of Action. However, jurisdiction may be sustained under a statute which properly confers jursidiction whether or not pled in the complaint. *Mumford* v. *Flover*, 503 F.2d 878, 882 (5th Cir. 1974); *Paynes* v. *Lee*, 377 F.2d 61, 63 (5th Cir. 1967).

32. Rule 15(b), of the federal Rules of Civil Procedure, provides that a complaint may be treated as amended to conform to the evidence. *See Globe Liquor Co.* v. *San Roman*, 160 F.2d 800 (7th Cir. 1947); *Fifth Avenue Bank of New York* v. *Hammond Realty Co.*, 130 F.2d 993 (7th Cir. 1942). The substance of the claim asserted by MMCA in the Third Cause of Action is set out in a plain statement which is adequate notice to Carlough and SMWIA that MMCA asserts a claim arising under one of the laws of the United States regulating commerce. Although 28 U.S.C. § 1337 is not explicitly alleged as a basis for jurisdiction, it has been argued by counsel for MMCA that the intent of Rule 1 of the Federal Rules of Civil Procedure that the rules "be construed to secure the just, speedy, and inexpensive determination of every action" requires that this court consider whether the Third Cause of Action arises under a law of the Unsited States regulating commerce within the meaning of 28 U.S.C. § 1337. Under Rule 54(c) of the Federal Rules of Civil Procedure, a final judgment must grant relief to which a party is entitled, even if the party has not demanded such relief in his pleadings. The complaint should be considered as if properly amended in view of the liberality in granting relief although not demanded and the free power of amendment given by Rule 54(c) and Rule 15(b). *See Downey* v. *Palmer*, 114 F.2d 116, 117 (2d Cir. 1940):

> To require a new action to be brought instead of permitting the pending action to go on to trial, with proper amendment of the complaint to convert the action into one for fraud, seems an unnecessary and undesirable insistence upon the original form of the plaintiff's statement of his case, which the new Rules were designed to avoid.

33. The uncontradicted evidence establishes that the Third Cause of Action *arises under* Section 302, which is "any Act of Congress regulating commerce" within the meaning of 28 U.S.C. § 1337. Therefore, this court has original jurisdiction of the Third Cause of Action under 28 U.S.C. § 1337. The Third Circuit upheld such jurisdiction under 28 U.S.C. § 1337 of an action for damages for alleged violation of Section 302 in *Nedd* v. *United Mine Workers*, 556 F.2d 190, 203 (3rd Cir. 1977).

The Implied Federal Damage Remedy

34. Damages may be recovered by a person injured by a violation of a federal statute, in accordance with the factors set out in *Cort* v. *Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). The factors enunciated by the United States Supreme Court in *Cort* v. *Ash* are summarized by Justice Brennan as follows:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one tradtionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78, 95 S.Ct. at 2088, 45 L.Ed.2d at 36.

35. MMCA is one of the class "for whose especial benefit the statute was created." *See Arroyo* v. *United States*, 359 U.S. 419, 425-26; 79 S.Ct. 864, 868; 3 L.Ed.2d 915 (1959). MMCA is an "association of employers," intended to be protected by Section 302 against demands for unlawful payments by representatives of employees, with standing to bring suit under Section 302. *Employing Plasterers' Assn. of Chicago* v. *Plasterers, Local 5*, 279 F.2d 92 (7th Cir. 1960).

36. There is a clear indication in Subsection 302(e) that civil remedies for enforcement would be recognized. Since some federal civil actions would be recognized, Congress obviously assumed that the federal courts would fashion both remedial and substantive rules of law for their disposition. Nothing in either the text of Section 302 or in its legislative history suggests any hostility to damage remedies. *Nedd* v. *United Mine Workers*, 556 F.2d 190, 204 (3d Cir. 1977).

37. The recognition of private enforcement is entirely consistent with the underlying legislative scheme. In contrast with the statute considered in *Cort* v. *Ash*, *supra*, Section 302 is more than a

bare criminal statute. As the Third Circuit held in *Nedd* v. *United Mine Workers*, 556 F.2d 190, 204 (3d Cir. 1977), "[r]ecognition of an implied private action for recovery of money [for violation of Section 302] can in no way conflict with enforcement efforts entrusted to a public agency."

38. MMCA resisted, to its expense and damage, unlawful demands that MMCA agree on behalf of employers to make payments which would have violated Section 302 and sought judicial relief; these efforts by MMCA resulted in amendment of the SASMI trustee selection procedure. As the Fifth Circuit recognized in its prior opinion in this case, this court's "preliminary injunction . . . and its finding that the SASMI Trust Agreement violated the equal representation requirement under Section 302(c)(5)(B) obviously spurred the SASMI trustee's subsequent amendment" of the SASMI trustee selection procedure. 566 F.2d at 1216. Recognition of a cause of action for damages resulting from MMCA resistance which enforced the statute and protected MMCA and employers represented by MMCA from unlawful demands, and also protected employees of employers represented by MMCA, is consistent with the statutory purpose.

39. Recognition of a cause of action for the recovery of money for the trust (as resulted when SMWIA repaid money to SASMI on september 11, 1975) is consistent with the overall statutory purpose of Subsection 302(c)(5) — the preservation of the trust corpus for its intended beneficiaries. *Nedd, supra* at 204.

40. While the duties of fiduciaries have traditionally been a matter of concern of the states, collective bargaining agreements, at least in the private sector, have since 1947 been of federal concern. While SASMI is nominally a trust created under state law, it is a unique kind of trust, the corpus of which is the fruit of collective bargaining agreements. The very enactment of Subsection 302(c)(5) shows that Congress was not satisfied to leave protection of these bargained-for benefits entirely to the state law of trusts. *Nedd, supra* at 205.

40. MMCA is entitled to damages for its injury sustained as a result of violation of Section 302 by Carlough and SMWIA in causing

Local 441 to strike employers represented by MMCA to coerce MMCA to agree on behalf of employers represented by MMCA to pay money to SASMI, which at that time violated Section 302. *Nedd, supra.*

The State Law Damage Claims Of The Fourth And Fifth Causes Of Action

41. The Fourth and Fifth Causes of Action each present state law claims based on the tort of wrongful interference with a lawful occupation.

42. Pendent jurisdiction to the Section 302 claim is asserted under the Fourth Cause of Action, and diversity jurisdiction under 28 U.S.C. § 1332 is asserted under the Fifth Cause of Action.

43. MMCA's damage claims based on state law must satisfy two tests: first, whether staste law creates such a cause of action; second, if state law creates such a cause of action, is the cause of action preempted by federal law?

The Merits Of The State Law Claim

44. Alabama law provides a remedy to every person for injury to person or property, under the Alabama Constitution of 1901, Article I, Sec. 13, which provides in pertinent part:

> . . . every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; . . .

The "injury" contemplated by Section 13 is the injury which arises from breach of a legal duty. *Pickett* v. *Matthews*, 238 Ala. 542, 545; 192 So. 261 (1939).

45. Alabama law has long recognized that the "right to conduct one's business, without the wrongful and injurious interference of others, is a valuable property right." *Hardie-Tynes Mfg. Co.* v. *Cruse*, 189 Ala. 66, 66 So. 657, 660 (1914). The tort of interference with a lawful business survives, and is applicable in labor disputes. *International Union, UAW* v. *Russell*, 264 Ala. 456, 88 So.2d 175 (1956), *aff'd.*, 356 U.S. 634, 78 C.Ct. 932, 2 L.Ed.2d 1030 (1958).

46. Under Alabama law, as the Alabama Supreme Court said in *Hardie-Tynes Mfg. Co.* v. *Cruse, supra,* at ____ , 66 So. at 661, "every criminal act which injures the person or property of another is also a civil tort, redressable by the courts . . ." *Wilful violation* of Section 302 is a criminal act under Subsection 302(d).

47. Courts of Alabama recognize and are bound by the laws of the United States, because, as the Alabama Supreme Court stated in *Forsyth* v. *Central Foundry Co.*, 240 Ala. 277, 282; 198 So. 706 (1940), "[t]he laws of the United States are as much a part of the law of Alabama as its own local laws." Alabama courts in appropriate cases interpret the duties imposed by the law of other states, as in *Allen Trucking Co., Inc.* v. *Blakely Peanut Co.*, 340 So.2d 452 (Ct. Civ. App. Ala. 1976), interpreting Georgia law as to alleged breach of a duty imposed by Georgia law. In cases which turn upon the interpretation of federal law, the Alabama courts must interpret and apply federal law.

48. A federal damage claim and a state damage claim for unlawful interference with business may arise from the same course of conduct by a union, as in *United Mine Workers* v. *Meadow Creek Coal Co.*, 263 F.2d 52, 60 (6th Cir. 1959), *cert. denied* 359 U.S. 1013, 79 S.Ct. 1149, 3 L.Ed.2d 1038 (1959), which affirmed an award of compensatory damages under federal law and punitive damages under state law for the same union course of conduct.

49. The Fifth Circuit analyzed the Alabama tort of interference with a lawful business in *Thompson* v. *Allstate Ins. Co.*, 476 F.2d 746, 748 (5th Cir. 1973), as follows:

> . . . prima facie, a cause of action for intentional interference with another's business is established by showing: (1) an intentional act of interference and (2) some consequential harm to the plaintiff's business. *See* Sparks v. McCrary, *supra;* Carter v. Knapp Motor Co., *supra;* Kelite Products v. Binzel, 5 Cir. 1955, 224 F.2d 131. Justification for interference in another's business is an affirmative defense and is no part of the plaintiff's case.. . . [footnote omitted].

The violation of a federal statute such as Section 302 cannot constitute "justification" as a defense to the tort of interference with another's business.

50. Carlough and SMWIA have not urged, and this court does not discern, any justification for the intentional interference by Carlough and SMWIA with the business of MMCA by violation of Section 302. The central issue with respect to the intentional interference with business of MMCA is whether the demand for SASMI was lawful. As set out above, the demand for SASMI was not lawful because SASMI, as demanded in 1974 negotiations, did not comply with Section 302. The unlawful demand for SASMI cannot constitute a justification for intentional interference with the business of MMCA, and the unlawfulness of the demand and strike for SASMI makes the interference by Carlough and SMWIA with the business of MMCA wrongful for the purposes of the Alabama tort action.

51. MMCA, which has been injured by wrongful interference with its lawful business by Carlough and SMWIA, has a cause of action for damages under Alabama under the theories of law advanced in *Thompson*, *Russell*, and *Hardie-Tynes*, *supra*.

52. SMWIA and Carlough wrongfully interfered with the business of MMCA by causing demands and a strike for SASMI in violation of Section 302, and MMCA has demonstrated the essentials of an Alabama tort action for wrongful interference with a lawful occupation. The conclusion that MMCA has an Alabama tort action does not end the inquiry, however, because it must also be decided whether federal law preempts MMCA's claim. On this question, the Court is convinced that MMCA's Alabama tort actions are not preempted by the National Labor Relations Act, or Section 302, because such tort actions pose no risk of interference with the national labor policy.

The Preemption Issue

53. The leading case enunciating the doctrine of preemption is *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). *Garmon* held that a state tort action was preempted where there was a substantial risk of interference with national labor policy enunciated in the National Labor Relations Act. *Garmon* did not, however, as the Union Defendants suggest, hold that federal law preempts all state law claims based upon a "course of conduct" which may have violated the National Labor Relations Act.

54. The United States Supreme court has recognized that a course of conduct which constitutes an unfair labor practice may also give rise to a cause of action for damages. *Russell, supra,* recognized that the same actions by the union which gave a cause of action under the Alabama tort of wrongful interference with a lawful occupation, also may have violated Section 8(b)(1)(A) of the National Labor Relations Act. Another decision, *Vaca* v. *Sipes,* 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), held that a tort action based on breach of the union's duty of fair representation was not preempted, although the court assumed for its argument that "such a breach of duty by the union is an unfair labor practice." *Id.* at 186, 87 S.Ct. at 915, 17 L.Ed.2d at 855.

55. Numerous decisions of the United States Supreme Court have recognized exceptions to the doctrine of preemption. *Sears, Roebuck & Co.* v. *Carpenters,* ____ U.S. ____, 98 S.Ct. 1745, 56 L.Ed.2d 209 (May 15, 1978) (trespass); *Farmer* v. *Carpenters,* 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) (intentional infliction of mental distress); *Vaca* v. *Sipes, supra* (breach of the union's duty to represent employees fairly); *Linn* v. *Plant Guard Workers,* 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966) (libel); *Russell, supra* (the Alabama tort of wrongful interference with a lawful occupation by blocking of access to work); and *United Construction Workers* v. *Laburnum Construction Corp.,* 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025 (1954), involving a tort action founded on threats of violence).

56. The preemption doctrine enunciated in *Garmon, supra,* protects the jurisdiction of the National Labor Relations Board with respect to conduct that is *arguably protected* or *arguably prohibited* under the National Labor Relations Act. As the Supreme Court has recently stated in *Sears, supra,* "the Court has refused to apply the *Garmon* guidelines in a literal, mechanical fashion." ____ U.S. at ____, 56 L.Ed.2d at 220, *citing Farmer, supra* at 296-97, 51 L.Ed.2d at 338. The Court in *Sears* considered whether the controversy presented to the state court was identical to, or different from

that which could have been presented to the National Labor Relations Board:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application, but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the Garmon doctrine was designed to avoid.

____ U.S. at ____ , 56 L.Ed.2d at 225 (footnote omitted).

57. *Vaca, supra,* recognized a cause of action for breach of the union duty of fair representation, a duty which itself is derived from federal law, the National Labor Relations Act. As the Court recognized in *Vaca,* breach of the duty of fair representation, which violates Section 8(b)(3) of the NLRA, simultaneouslsy gives rise to a cause of action which is not preempted.

58. The Court in *Vaca* reasoned that a claim cognizable in state courts could arise from breach of a federal statutory duty, and that the national labor policy did not require preemption of such a claim for breach of the duty of fair representation. The Court subsequently analyzed *Vaca* in *Amalgamated Assn. of Street, Electric Railway, and Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473 (1971), recognizing that preemption does not preclude causes of action

> where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes, Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967).

Id. at 297-98, 91 S.Ct. at 1923, 29 L.Ed.2d at 489.

59. The controversy which underlies the MMCA state law claims is whether the demands and strike for SASMI, which were

caused by SMWIA and Carlough, and which interfered with the business of MMCA, were *wrongful* because they violated Section 302. That controversy, the wrongfulness of the demands and the strike under Section 302, is not within the jurisdiction of the National Labor Relations Board, as the National Labor Relations Board explicitly recognized in *Sheet Metal Workers International Association* (Central Florida Sheet Metal Contractors Association, Inc./), 234 NLRB No. 162, p. 13-14 (1978):

> [W]e conclude that the Board does not possess jurisdiction to determine whether SASMI violates the equal representation requirement of Section 302(c)(5)(B). In reaching this conclusion, we first note that Congress, in Section 10(a) of the Act, vested the Board with jurisdiction over conduct which constitutes a violation of Section 8, and, as we have indicated above, the cases relied on by the Administrative Law Judge herein certainly do not support the principle that we should, *sua sponte*, extend that jurisdiction to encompass alieged violations of Section 302(c)(5). Aside from that, however, after assiduously considering our obligation to be mindful of other statutory policies in administering our Act, we think it clear that the grant of jurisdiction contained in Section 302(e) indicates the intention of Congress that the judiciary, and only the judiciary, shall construe the substantive provision of that section.

60. Violation of Section 302, which is the underlying wrong upon which MMCA bases its state law claims, is neither arguably protected nor *arguably prohibited* by the National Labor Relations Act.

61. The National Labor Relations Board has jursidction to determine whether demands (and a strike) for SASMI violate Sections 8(b)(3) or 8(b)(1)(B) of the National Labor Relations Act. Whether such demands (and the strike in support of these demands) violate Section 302 is a distinct issue, which is within the jurisdiction of the courts, not the National Labor Relations Board.

62. Here, as *Lockridge* analyzed *Vaca*, the "rule of law sought to be invoked," Section 302, "is so structured and administered that . . . it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." 403 U.S. at 297-98, 91 S.Ct. at 1923; 29 L.Ed.2d at 489.

63. State law claims founded upon breach of the legal duty imposed by Section 302, "create no realistic risk of interference with the Labor Board's primary jurisdiction to enforce the statutory prohibition against unfair labor practices" under the analysis of Court in *Sears, supra,* ____ U.S. at ____ , 56 L.Ed.2d at 226.

64. The *Sears,* analysis is not confined (as the Union Defendants suggest) to situations in which no unfair labor practice charges were filed. Although *Sears* involved a case in which no unfair labor practices were filed, it does not follow that the filing of unfair labor practice charges automatically preempts state causes of action. As the National Labor relations Board itself has recognized, state law may provide additional remedies for the same conduct which is the subject of meritorious unfair labor practice charges because state law causes of action which are not otherwise preempted survive the filing of unfair labor practice charges. In *Union de Tronquistas* (Lock Joint Pipe & Co. of Puerto Rico), 202 NLRB 399 (1973), the National Labor Relations Board refrained from awarding damages for certain union unfair labor practices on the explicit basis that injured parties had adequate surviving state law remedies arising from the same course of conduct:

> The lack of a Board order awarding backpay to employees unable to work because of injuries resulting from a union's unlawful conduct will not leave such employees without redress against those responsible for their injuries. These individuals will still have available those private remedies traditionally used to process claims resulting from another's tortious conduct.

65. MMCA is entitled to damages for injuries sustained by MMCA as a result of wrongful interference with its lawful occupation caused by Carlough and SMWIA In violation of Section 302.

66. Alabama law will permit the recovery of punitive damages in labor disputes such as this upon a showing that the tortious conduct is wilful or malicious. *International Union, U.A.W.* v. *Russell,* 356 U.S. 634, 646; 78 S.Ct. 932, 939; 2 L.Ed.2d 1030 (1958).

The Seventh Cause of Action

67. The Seventh Cause of Action arises under Section 303 of the Labor Management Relations Act, as amended, 29 U.S.C. § 187.

Section 303 gives a cause of action to any person injured by violation of section 8(b)(4) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4).

68. Section 8(b)(4)(A), 29 U.S.C. § 158(b)(4)(A), in pertinent part, prohibits restraint or coercion of a person by a labor organization or its agents with an object of "forcing . . . any employer . . . to join any . . . employer organization."

69. Section 8(b)(4)(A) prohibits efforts by a labor organization or its agents to force an employer to *act as if it belonged* to an employer organization, or to force an employer to engage in industry-wide bargaining. *Frito-Lay, Inc.* v. *Teamsters*, 401 F.Supp. 370 (N.D. Cal. 1975) (Frito-Lay I); *Frito-Lay, Inc.* v. *Teamsters*, 94 LRRM 3047 (N.D. Cal. March 26, 1976, and February 8, 1977) (Frito-Lay II). Judge Renfrew in *Frito-Lay I*, reasoned as follows:

> The first issue before the Court is whether Section 8(b)(4)(A) prohibits only strikes whose object is to force an employer to join an employer organization or whether it also prohibits a strike whose object has the practical effect of forcing all companies in an industry to accept one identical contract even though there is no formal employer organization.
>
> * * *
>
> In light of this legislative history, the Court concludes that Congress intended to proscribe involuntary industry-wide bargaining when it enacted Section 8(b)(4)(A). Accordingly, the court holds that Section 8(b)(4)(A) proscribes not only strikes where an object thereof is to force an employer to join a formal employer organization, but also strikes where an object thereof is to force several employers to act in effect as if they belonged to such an employer organization which engaged in industry-wide bargaining on their behalf. To hold otherwise would be to exalt form over substance and disregard the totality of the forces which gave rise to Section 8(b)(4)(A). If defendants conduct their collective bargaining in a manner which forces employers in an industry to act as if they were members of a formal employer organization, then there is no reason not to subject them to civil liability under Section 303(b) of the LMRA.

401 F.Supp. at 373, 375-76.

70. MMCA was restrained and coerced by the strike of employees represented by Sheet Metal Workers Local 441 which was caused by Carlough and SMWIA, with an objective of forcing MMCA to agree to SASMI. Agreement to article X, Section 8, of the "Standard Form of Union Agreement" was a condition of SASMI, and Article X, Section 8, would require that MMCA surrender collective bargaining authority to SMACNA, to fix new contract terms.

71. SMACNA is an employer organization within the meaning of Section 8(b)(4)(A).

72. The demand that MMCA agree on behalf of employers represented by MMCA to SASMI, and thereby to Article X, Section 8, was, in effect, a demand that MMCA, and employers represented by MMCA, act as if they had joined SMACNA, an employer organization, for the purpose of determining new contract terms pursuant to Article X, Section 8.

73. SMWIA and Carlough caused a strike which restrained and coerced MMCA with an objective of forcing MMCA to engage in limited industry-wide bargaining with respect to the industry-wide SASMI Trust Fund. Involuntary industry-wide bargaining is the evil which Section 8(b)(4)(A) was intended to prevent, *see Frito-Lay I, supra*, and the effort to compel involuntary industry-wide bargaining for SASMI, although limited in scope to a particular issue, is nonetheless prohibited by Section 8(b)(4)(A).

74. MMCA is entitled to damages which it suffered as a result of restraint and coercion by SMWIA and Carlough, to force MMCA to agree to Article X, Section 8, of the "Standard Form of Union Agreement," which was a condition of participation in SASMI, and to force MMCA to engage in involuntary industry-wide bargaining with respect to SASMI. Accordingly,

The renewed motion of the defendants Carlough, Doby, Hinkle, SMWIA and Local 441 for summary judgment as to the Fourth, Fifth, and Seventh Causes of Action is DENIED; and the Court, having concluded that there is no genuine issue as to any material fact except as to the amount of damages, and having concluded that the plaintiff,

MMCA, is entitled to judgment as a matter of law under the Third, Fourth, Fifth, and Seventh Causes of Action for such amount as shall be found to be due MMCA as damages, the Court is of the opinion that summary judgment is due to be entered in favor of MMCA under the Third, Fourth, Fifth, and Seventh Causes of Action for such amount as may be due MMCA as damages and that this cause is due to be placed on the calendar for trail on the sole issue of damages.

DONE this 17th day of August, 1978.

/s/ W. B. HAND
W. B. Hand
UNITED STATES DISTRICT JUDGE

U.S. DIST. COURT
SOU. DIST. OF ALA.
FILED AND ENTERED THIS THE 17th DAY OF AUGUST, 1978
MINUTE ENTRY NO. 47,092
WILLIAM J. O'CONNOR, CLERK
/s/ G. R. SYLVESTER
G. R. Sylvester
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No.
74-409-H

MOBILE MECHANICAL CONTRACTORS ASSOCIATION, INC.

Plaintiff,

v.

EDWARD J. CARLOUGH, individually and as the representative of all members of the Sheet Metal Workers' International Association, K. C. DOBY, JIMMY A. HINKLE, A. BRUCE McKENZIE, JOHN R. FALVELLA, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, an unincorporated association, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION #441, as unincorporated association

Defendants.

JUDGMENT

This was submitted to the Court on arguments and briefs on the defendants' motions for summary judgment as to the third, fourth, fifth, and seventh causes of action and the Court, having duly considered the issues raised, in accordance with the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED, ADJUDGED, and DECREED that such motions are DENIED and that summary judgment be entered on such causes of action in favor of the plaintiffs, with damages resulting therefrom to

be determined by further hearings. All costs will abide the conclusion of the damages hearing.

DONE this 17th day of August, 1978.

/s/ W. B. HAND
W. B. Hand
UNITED STATES DISTRICT JUDGE

U.S. DIST. COURT
SOU. DIST. OF ALA.
FILED AND ENTERED THIS THE 17th DAY OF AUGUST, 1978
MINUTE ENTRY NO. 47,092
WILLIAM J. O'CONNOR, CLERK
/s/ G. R. SYLVESTER
G. R. Sylvester
Deputy Clerk

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No.
74-409-H

MOBILE MECHANICAL CONTRACTORS

Plaintiff,

v.

EDWARD J. CARLOUGH, and SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,

Defendants.

RULE 58 JUDGMENT

This action came on for trial before the Court and a Jury, Honorable W. B. Hand, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is ORDERED and ADJUDGED that the plaintiff, MOBILE MECHANICAL CONTRACTORS, recover of the defendants, EDWARD J. CARLOUGH and SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, the sum of SEVENTEEN THOUSAND AND NO/100 ($17,000.00) DOLLARS, and plaintiffs costs of this action.

It is ORDERED and ADJUDGED that the plaintiff, MOBILE MECHANICAL CONTRACTORS, recover of the defendant, ED-

WARD J. CARLOUGH, the sum of TEN THOUSAND AND NO/100 ($10,000.00) DOLLARS, and plaintiffs costs of this action.

DATED at Mobile, Alabama, this the 23rd day of February, 1979.

/s/ W. B. HAND
W. B. Hand
UNITED STATES DISTRICT JUDGE

U.S. DIST. COURT
SOU. DIST. OF ALA.
FILED AND ENTERED THIS THE 17th DAY OF AUGUST, 1978
MINUTE ENTRY NO. 47,092
WILLIAM J. O'CONNOR, CLERK
/s/ G. WALTER
G. Walter
Deputy Clerk

APPENDIX D

No. 79-2054

MOBILE MECHANICAL CONTRACTORS ASSOCIATION, INC.

Plaintiff-Appellee,

v.

EDWARD J. CARLOUGH, individually and as the representative of all members of the Sheet Metal Workers' International Association, *et al.*,

Defendants-Appellants.

United States Court of Appeals,
Fifth Circuit.*
Unit B

Dec. 21, 1981.

Appeal from the United States District Court For The Southern District Of Alabama.

Before GOBBOLD, Chief Judge, TUTTLE and HILL, Circuit Judges.

GODBOLD, Chief Judge:

This case concerns a lenghty dispute between the Mobile Mechanical Contractors, ("the association") an association representing several employers for collective bargaining purposes, and Sheet Metal Workers' International Association ("the union"), its president Edward J. Carlough, and its Mobile local ("the union local"). The dispute arose over two union demands that triggered a peaceful economic strike by the local from July 16 to October 16, 1974.

The union local had demanded that the association contribute to SASMI, a nationwide employee trust fund for sheet metal workers

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452 — October 14, 1980.

founded by the union and Carlough. The association has consistenly maintained that the trust fund, as it was then structured, violated § 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186.[1] The union local also demanded that the association agree to the union's "Standard Form of Union Agreement." Article X, § 8 of this agrement provided that if the association and the union local reach a bargaining impasse they must submit their dispute to the National Joint Adjustment Board, composed of union representatives and representatives of the Sheet Metal and Air Conditioning Contractors' National Association, an employer organization to which the Mobile Contractors' Association members do not belong. The adjustment board is empowered to formulate new contract terms through unanimous decision. Otherwise the dispute would be returned to the association and the local for resolution through traditional economic warfare.[2]

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[1] Specifically, the association argued that the trust fund contravened § 302(c)(5)(B), 29 U.S.C. § 186(c)(5)(B), which requires that employers and the union be equally represented in the administration of employee benefit trust funds.

[2] Article X, § 8 of the Standard Form of Union Agreement provides:

> (a) Should the negotiations for renewal of this agreement become deadlocked in the opinion of the Local Union or of the Local Contractors' Association, or both, notice to that effect should be given to the office of the General President of Sheet Metal Workers' International Association and the national office of the Sheet Metal & Air Conditioning Contractors' National Association, Inc. If the General President of Sheet Metal Workers' International Association and the Chairman of the Labor Committee of Sheet Metal and Air Conditioning Contractors' National Association believe the dispute might be adjusted without going to final hearing before the National Joint Adjustment Board, each will then designate a panel representative who shall proceed to the locale where the dispute exists as soon as convenient, attempt to conciliate the differences between the parties and bring about a mutually acceptable agreement. If such panel representatives or either of them conclude that they can not resolve the dispute, the parties thereto and the General President of Sheet Metal Workers' International Association and the national office of Sheet Metal and Air Conditioning Contractors' National Association shall be promptly so notified without recommendation from the panel representatives. Should the President of Sheet Metal Workers' International Association or the Chairman of the Labor Committee of Sheet Metal and Air Conditioning Contractors' National Association fail or decline to ap-

The association turned to both the National Labor Relations Board and the courts for relief from the strike. On August 23, 1974 the association filed unfair labor practice charges against the union local, and two months later filed similar charges against the union and Carlough. The Board consolidated these charges and set a hearing. The parties settled, however, and on December 3, 1976 the NLRB entered a consent order restraining the union local from making similar future demands for the trust fund or the arbitration clause. The Board's order was enforced by this court. *NLRB* v. *Sheet Metal*

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point a panel member or should notice of failure of the panel representatives to resolve the dispute be given, the parties shall promptly be notified so that either party may submit the dipsute to the National Joint Adjustment Board.

The dispute shall be submitted to the National Joint Adjustment Board pursuant to the rules as established and modified from time to time by the National Joint Adjustment Board. The unanimous decision of said Board shall be final and binding upon the parties, reduced to writing, signed and mailed to the parties as soon as possible after the decision has been reached. There shall be no cessation of work by strike or lockout unless and until said Board fails to reach a unanimous decision and the parties have received written notification of its failure.

(b) Any application to the National Joint Adjustment Board shall be upon forms prepared for that purpose subject to any changes which may be decided by the Board from time to time. The representatives of the parties who appear at the hearing will be given the opportunity to present oral argument and to answer any questions raised by members of the Board. Any briefs filed by either party include copies of pertinent exhibits will also be exchanged between the parties in advance of the hearing.

(c) The National Joint Adjustment Board shall have the right to establish time limits which must be met with respect to each and every step or procedure contained in this section. In addition, the President of SMWIA and the Chairman of the National Labor Committee of SMACNA shall have the right to designate time limits which will be applicable to any particular case and any step therein which may be communicated to the parties by mail, telegram, or telephone notification.

(d) Unless a different date is agreed upon mutually between the parties or is directed by the unanimous decision of the National Joint Adjustment Board, all effective dates in the new agreement shall be retroactive to the date immediately following the expiration date of the expiring agreement.

Workers International Assn. Local No. 441, No. 77-3080 (5th Cir. Nov. 2, 1974) (unpublished).

The association also sued the defendants in federal district court seeking to enjoin the strike under § 302(e) of the Labor Management Relations Act, 29 U.S.C. § 186(e). The district court held that the trust fund violated § 302(c) of the Act, 29 U.S.C. § 186(c), and granted a preliminary injunction restraining the union local from continuing the strike or demanding that the association contribute to the trust fund. *Mobile Mechanical Contractors Assn.* v. *Carlough*, 382 F.Supp. 1134 (S.D.Ala.1974). On appeal this court concluded that the injunction issue was moot because, *inter alia*, during the pendency of the appeal the parties had agreed to a contract without the trust fund. *Mobile Mechanical Contractors Association* v. *Carlough*, 566 F.2d1213 (5th Cir. 1977). The parties also omitted from the contract Article X, § 8, of the Standard Form of Union Agreement.

After this court remanded the case to the district court, the association sought damages for the strike from the union and Carlough on a variety of theories. It alleged an implied cause of action in favor of employers under § 302(c) based upon the union local's demand for the trust fund, a diversity claim under Alabama law for tortious interference with a lawful business, and a claim under § 303, 29 U.S.C. § 187, grounded on the theory that the strike for Article X was an unfair labor practice under § 8(b)(4)(A) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(A). In addition, the association sought punitive damages on the first two claims.

The district court denied defendants' motion for summary judgment and granted summary judgment as to liability in favor of the association on all of these claims, *Mobile Mechanical Contractors Assn.* v. *Carlough*, 456 F.Supp. 310 (S.D. Ala.1978). A trial was held to determine damages. The jury awarded $17,000 in general damages against the union and Carlough and $10,000 in punitive damages against Carlough. The defendants do not question the amount of damages awarded but contend that the district court erred in failing to grant their motion for summary judgment as to liability on all of the claims.

I. Section 303 claim

Section 303(b) of the Labor Management Relations Act, 29 U.S.C. § 187(b), provides a cause of action for damages in favor of any person sustaining injury to his property or business from any union unfair labor practice set forth in § 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4).[3] The association's § 303 claim is premised on the argument that the strike to obtain Article X violated § 8(b)(4)(A), which proscribes strikes to force an employer to join an employer organization.[4]

Relying on *Frito-Lay, Inc.* v. *Teamsters*, 401 F.Supp. 370 (N.D.Cal.1975), *affirmed*, 623 F.2d 1354 (9th Cir. 1980), the district court held that § 8(b)(4)(A) prohibits not only efforts to force an employer to join an employer organization but also efforts to force an

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[3] 29 U.S.C. § 187 provides in pertinent part:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in Section 158(b)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of Subsection (a) of this section may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.

Defendants do not question, and therefore we do not decide, whether the contractors association as an employer organization was injured in its "business or property" within the meaning of § 303. *Cf. United Mine Workers of America* v. *Railing*, 401 U.S. 486, 91 S.Ct. 991, 28 L.Ed.2d 272 (1971); *Farmers Co-Op Oil Co.* v. *Socony-Vacuum Oil Co.*, 133 F.2d 101 (8th Cir. 1942).

[4] 29 U.S.C. § 158(b)(4)(A) provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents — . . .
>
> (4)(i) to engage in, or induce or encourage any individual employed by any person engaged in commerce to engage in, a strike . . . or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is —
>
> (A) Forcing or requiring any employer or self-employed person to join any labor or employer organization. . . .

employer to act as if it belonged to an employer organization. It then reasoned that, by forcing the association to submit contract disputes to the adjustment board, Article IX, § 8, forced the association to cede some of its collective bargaining authority to the national employers organization to which neither the association nor its members belong. The district court then concluded that this requirement was tantamount to forcing the association to act as if it belonged to the national employers association.

[1] The defendants first argue that the decisions of the district court and the Ninth Circuit in *Frito-Lay* are based upon an erroneous interpretations of the legislative history of § 8(b)(4)(A). To say the least, the legislative history of § 8(b)(4)(A) is cryptic. The Conference Committee Report states only that

> Section 8(b)(4) of the conference agreement has been expanded to cover a matter which was covered by section 12 of the House bill, namely, concerted activity by a union or its agents to compel an employer or self-employed person to become a member.

House Conference Report No. 510, 80th Cong., 1st Sess. 44-45; [1947] *U.S.Code Cong. & Ad.News*, pp. 1135, 1150. Moreover, the conference agreement also explicitly omitted the provisions of the House bill "treating 'monopolistic strikes' as unlawful concerted activities" and "the matter of industry-wide bargaining." *Id.* at 1165.

Defendants contend that the *Frito-Lay* district court (and presumably the Ninth Circuit since it affirmed) overlooked these passages from the conference report and that these passages, as the last words of Congress on the subject, are controlling. We disagree. The opinions in *Frito-Lay* reflect a probing and comprehensive analysis of a legislative history that is far more complex than the defendants suggest.

Section 8(b)(4)(A) was the product of a compromise solution between two warring factions in Congress, those that opposed industry-wide bargaining and those that favored it. *Compare* H.R.Rep.No. 245, 80th Cong., 1st Sess. 5-6, 24, 35 (1947) *with id.* at 86 *and with* S. 1126, 80th Cong., 1st Sess. §§ 2(2), 9 (1947). The conference committee undertook to reconcile a House bill that ban-

ned all multi-employer bargaining. H.R. 3020, 80th Cong., 1st Sess. §§ 2(16), 9(f)(1), 12(a)(3) (1947) and a Senate bill that banned only involuntary multi-employer bargaining, S. 1126, 80th Cong., 1st Sess. §§ 2(2), 9 (1947). Contrary to defendants' assertion, the opinions in *Frito-Lay* did not overlook the conference report but interpreted it as rejecting the total ban on multi-employer bargaining contained in the House bill in favor of the more limited ban on involuntary multi-employer bargaining contained in the Senate bill. *See* 623 F.2d at 1358-59; 401 F.Supp. at 373-76. Moreover, this interpretation is supported by decisions of courts and the NLRB that uniformly have construed § 8(b)(4)(A) to proscribe the involuntary multi-employer bargaining that results when a union attempts to compel an employer to join an employer organization for collective bargaining purposes. *See Amax Coal Co.* v. *NLRB*, 614 F.2d 872, 878-81 (3d Cir. 1980), *rev'd on other grounds*, ____ U.S. ____ , 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981); *Union de tronquistas de Puerto Rico* v. *Arlook* 586 F.2d 872, 876 (1st Cir. 1978); *United Mine Workers, Local 1854 (Amax Coal Co.)*, 238 NLRB 1583 (1978), *enforcement denied on other grounds*, 614 F.2d 872 (3d Cir. 1980), *rev'd on other grounds*, ____ U.S. ____ , 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981); *Glass Workers Local 1892 (Frank J. Rooney, Inc.)*, 141 NLRB 106 (1963); *I.L.W.U. Local 8 (General Ore, Inc.)*, 126 NLRB 172 (1960); *United Construction Workers (Kanawha Coal Operators Assn.)*, 94 NLRB 1731 (1951).

Frito-Lay holds that § 8(B)(4)(A) prohibits union efforts to compel an employer to join an employer organization. We conclude that this section also prohibits union efforts to compel an employer to act as if it were a member of an employer organization. A contrary conclusion would mean that Congress intended to allow unions to accomplish indirectly the forbidden objectives by merely insisting that the employer though not a member of the organization conduct itself as though it were and accordingly abide by collective bargaining decisions made by the organization. The reasoning of the Ninth Circuit in *Frito-Lay* is persuasive on this point:

> There is nothing talismanic about the term "employer organization." Neither the Board nor the courts have ever required that employers organize themselves into a formal association to be

> considered an employer organization for purposes of the Act. On the contrary, "substance rather than legalistic form is all the Board has ever required in multi-employer barganing." . . . To form a multi-employer group, individual employers need only exhibit an unequivocal intention to be bound in collective bargaining by group rather than individual action. . . . No formal organizational structure is required. Recognizing the potential informality of multi-employer bargaining units, we think it unlikely that Congress sought in section 8(b)(4)(A) to prohibit a union from forcing an employer organization but to permit a union to force competing employers to bargain together as an informal group. Attributing that interpretation to the section would allow a union to force employers to engage in multi-employer bargaining as long as the Union did not make the mistake of requiring the employers involved to become members of a formal existing employer organization.

623 F.2d at 1358 (citations omitted).

[2] We turn to the next question, which is whether Article X compels the assocition or its members to act as if they were members of the national employers association. Defendants, conceding that the strike to obtain Article X may have violated §§ 8(b)(1)(B) and 8(b)(3)[5] argue that Article X does not force the association to bargain

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[5] Relying on the Supreme Court's recent decision in *NLRB* v. *Amax Coal Co.*, ___ U.S. ___ , 101 S.Ct. 2789, 69 L.Ed.2d 672 (1981), defendants take this concession a step further and contend that, because Article X violates § 8(b)(1)(B), it necessarily must not violate § 8(b)(4)(A) since the two provisions must regulate different activity. The argument is flawed. While § 8(b)(1)(B) was intended, among other things, "to prevent unions from forcing employers to join multiemployer bargaining units," ___ U.S. at ___ , 101 S.Ct. at 2797, 69 L.Ed.2d at 683, it does not follow that § 8(b)(1)(B) was the exclusive means used by Congress to curb such activity nor that the activities proscribed by §§ 8(b)(1)(B) and 8(b)(4)(A) were not intended to overlap in certain circumstances. Indeed, if a union were to compel an employer to join an employer organization that engaged in collective bargaining for the employer, the union would violate both provisions simultaneously. The Board explicitly so held in its decision in the *Amax* case, *United Mine Workers, Local 1854 (Amax Coal Co.,)*, 238 NLRB No. 214 (1978), and the issue was not appealed. 69 L.Ed.2d at 679 n.6. Thus, although not all § 8(b)(4)(A) violations are also § 8(b)(1)(B)

through the national employers association as though members thereof, rather it only requires the association to submit to "a limited form of interest arbitration before a private tribunal, [the adjustment board] . . . on which half of the members were appointed by the [union] and half by an employer organization, SMACNA [the national employers association], to which MMCA [the association] did not belong." Defendants note further that Article X leaves the association free to bargain with union locals and that the adjustment board takes over only when the association's bargaining reaches, impasse. Even then, the adjustment board cannot forge the association's contract unless it does so unanimously.

These distinctions are unpersuasive. The adjustment board was formed to resoive collective bargaining disputes between members of the national employers association and union locals. Although the association is not a member of the national employers association, Article X compels it to act as if it were a member and submit collective bargaining disputes it has with union locals to the adjustment board. The critical factor is that the board performs collective bargining services for the asociation as if it were a member of the national employers association.[6] To the extent union locals make proposals to the association that parallel those gained from members of the national employers association, the association, upon reaching

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violation and vice versa, the defendants' argument that a violation of one can never be a violation of the other defies both the literal language and authoritative interpretation of the provisions. Accepting the union's concession that Article X may violate § 8(b)(1)(B), we hold only that this concession does not preclude a finding that the defendants also violated § 8(b)(4)(A).

[6] Article X only requires resort to the adjustment board when the Mobile association and union locals reach impasse, but this does not alter our conclusion. The arbitration by the adjustment board is a form of collective bargaining. *See NLRB* v. *Sheet Metal Workers, Local 38*, 575 F.2d 394, 400 (2d Cir. 1978). Thus, Article X forces the Mobile association to act as if it were a member of the national employers association for collective bargaining purposes in that the Mobile association, like a member of the national association, must submit disputes at impasse to the national association's interest arbitration board.

impasses, may not decide independently to endure a strike; rather, it — like a member of the national employers association—must abide by the decision of the adjustment board. And members of the national employers association on the adjustment board are likely to see little reason to free the Mobile association from provisions already contained in national contracts. The net effect is that Article X compels the association to act as if it were a member of the national employers association for collective bargaining purposes. The strike to obtain Article X thus violated § 8(b)(4)(A), and the district court properly determined that the association was entitled to recover damages under § 303. *See Frito-Lay*, 623 F.2d 1354, *supra*.

II. Preemption

At oral argument defendants' counsel conceded that the district court's award of general damages for the strike would be supported by a finding in the association's favor on either the cause of action based on § 8(b)(4)(A) or the implied cause of action under § 302(b). Since we have resolved the § 8(b)(4)(A) issue in the association's favor, we need not decide whether the district court correctly found an implied cause of action under § 302(b). However, the award of punitive damages is supportable only under the association's state law claim for damages from the strike.[7]

We must decide whether that claim was preempted. The district court held that the association had a cause of action under Alabama law for tortious interference with lawful business and that this claim was not preempted under the doctrine of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775

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[7] The association did not seek punitive damages on its § 8(b)(4)(A) claim. Although it did seek punitive damages in its claim alleging an implied cause of action under § 302(b), that claim cannot support such an award. Assuming without deciding that the district court was correct in finding an implied cause of action, *but see Piper* v. *Chris-Craft Industries Inc.*, 430 U.S. 1, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977), punitive damages would not be recoverable under it. *See Flaks* v. *Koegel*, 504 F.2d 702 (2d Cir. 1974); *Green* v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766 (1969).

(1959). It found that the "underlying wrong" upon which the association's state claims were based was that provisions in the trust fund violated § 302 and that violation of a federal law resulting in interference with a lawful business was wrongful interference with business under Alabama law. The district court noted that the NLRB had stated in a recent decision that it had no jurisdiction to determine whether SASMI, the trust fund, violated § 302, *Sheet Metal Workers International Association (Central Florida Sheet Metal Contractors Assn.)*, 234 NLRB No. 1238 (1978),[8] and, based thereon, reasoned that state law claims founded upon breach of legal duties imposed by § 302 do not encroach upon the primary jurisdiction of the NLRB. Relying primarily upon *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180, 98 S.Ct. 1745, 56 L.Ed.2d 209 (1978) and *United Auto Workers* v. *Russell*, 356 U.S. 634, 78 S.Ct. 932, 2 L.Ed.2d 1030 (1958), the district judge concluded that the union's peaceful strike to obtain the trust fund fell within an exception to the *Garmon* doctrine.

[3] We construe the preemption doctrine differently. The fundamental precept of *Garmon* is that liability under a state cause of action is preempted whenever it poses a serious risk of conflict with national labor policy. 359 U.S. at 243, 79 S.Ct. at 778. In determining whether such a risk exists we apply the rule that state causes of action are preempted if they attach liability to conduct that is arguably protected under § 7 or arguably prohibited under § 8 of the National Labor Relations Act. 359 U.S. at 245, 79 S.Ct. at 779.

[4] Application of the rule to this case leads us to conclude that the union's peaceful strike to obtain the trust fund fell within the preemptive umbrella of *Garmon*. The district court characterized the underlying wrong upon which the association's state claims were

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[8] The Board's decision in *Central Florida*, including the question of whether the Board has jurisdiction to determine if the trust fund violates § 302, has also been decided. *Central Florida Sheetmetal Contractors Assn.* v. *NLRB*, slip op. p. ____, ____ F.2d ____ (No. 79-2396 5th Cir. 1981). As our analysis indicates *infra* whether the Board has jurisdiction to determine the legality of the trust fund does not affect our resolution of the preemption issue in this case.

based as the union's demand for the trust fund, a trust fund that violated § 302. The basis of the association's state claims—and the activity from which its alleged damages flow—is not the union's demand for the trust fund but the strike in support of that demand. The proper focus of our preemption analysis is thus whether the strike to obtain the trust fund is arguably protected or prohibited by the Act.

Board decisions establish that a strike to obtain the trust fund is quite literally either protected or prohibited activity under the *Garmon* standard. Although not mentioned in the district court opinion, the association had previously petitioned the Board, alleging that the strike to obtain the trust fund was an unfair labor practice under § 8. The Board issued a cease and desist order prohibiting, *inter alis*, the union from striking to obtain the trust fund, and this court enforced the order.[9] Thus, the Board already has exercised its jurisdiction in this case and prohibited the very activity—the strike for the trust fund—for which the association now seeks damages under state law. To permit the association to supplement the Board's remedy with additional state damage remedies runs counter to the teaching of *Garmon:*

> Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventative relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the states' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. . . . The sanction [an award of damages] involves a conflict with federal policy in that it involves allowing two lawmaking sources to govern. In fact, since remedies form an ingredient of any integrated scheme of regulation, to allow the state to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.

We think it clear that the Board's order preventing the defendants from striking to obtain the trust fund preempted the association's state

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[9] Record at 447-61.

claims for damages based upon the state conduct. 359 U.S. at 246-47, 79 S.Ct. at 780-781.

[5] We find nothing in the Board's *Central Florida* decision lending support to the district court's conclusion that these state claims were not preempted. In *Central Florida*, 234 NLRB 1238 (1978), the Board rejected the contention of an employer association that the union's insistence on the trust fund was a nonmandatory subject of bargaining. The board's decision rested largely on its conclusion that it lacked jurisdiction to determine the legality of the trust fund under § 302. This conclusion does not mean, however, that the Board lacks jurisdiction to determine whether a union may strike to obtain the trust fund. Indeed, the Board in *Central Florida* concluded that the trust fund was a mandatory subject of bargaining. *See id.* Strikes over mandatory subjects of bargaining are, of course, protected activity under § 7, *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 233-34, 83 S.Ct. 1139, 1148-49, 10 L.Ed.2d 308 (1963), and are entitled to preemptive protection. *Garmon, supra.* [10]

The conflict between the consent order issued by the Board in this case prohibiting the union from striking to obtain the trust fund and the Board's decision in *Central Florida* allowing the union to strike for the same trust fund is more apparent than real. The Board entered no findings of fact in its consent order that would collaterally estop another union local from defending a strike by asserting the validity of the trust fund under § 8 or that would prevent the Board from later exploring the legality of the trust fund. The Board expressly declined to rule on the issues it subsequently decided in *Central Florida*. [11] In

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[10] Our holding today in *Central Florida*, which affirms the Board's decision but which refines its rationale, does not compel a different conclusion. We find in *Central Florida* that the Board's construction of § 8(b)(3) of the National Labor Relations Act, which permits bargaining in good faith to include bargaining to impasse for a trust fund that facially comports with § 302 of the Labor Management Relations Act, is reasonable and consonant with overall federal labor policy. Thus, the Board properly exercised its own jurisdiction to determine that the strike was protected by § 7.

[11] Record at 448-49.

either case, however, the strike for the trust fund was protected or prohibited.

The district court relied on *Sears* and other cases where state law was not found to be preempted. In *Sears* the Supreme Court held that a state trespass claim against picketing was not preempted under *Garmon*. But it was critical to the court's analysis that the state law claim was based upon the location of the picketing and not upon "whether the picketing had an objective proscribed by federal law. . . ." 436 U.S. at 198, 98 S.Ct. at 1758.

Similarly in *United Auto Workers* v. *Russell, supra*, the Supreme Court held that the state tort of wrongful interference with a lawful business relationship was not preempted where the picketing involved physical obstruction of a plant entrance and threats of violence. The court carefully noted that only damages resulting from these activities could be awarded, as opposed to damages resulting from the strike and picketing themselves. [12] 356 U.S. at 645, 78 S.Ct. at 939. In contrast, if defendants' claim of tortious interference was not preempted in the instant case, damages caused solely by the fact of the strike would be awarded.

One other case merits discussion. In *Farmer* v. *Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), although the Supreme Court found no preemption of a state claim for intentional infliction of emotional distress in connection with discriminatory hiring hall practices, the Court vacated the judgment of the state court of appeal and remanded because evidence introduced at trial might have led the jury to award damages to plaintiff for employment discrimination. Recovery, said the Court, had to be based upon "outrageous" conduct above and beyond the mere existence of discrimination. Likewise, recovery of damages based upon the existence of a strike without more would unduly interfere with federal labor regulations.

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[12] Although *Russell* did not expressly rely upon the presence of violence to support its holding of no preemption, subsequent Supreme Court cases have so characterized it. *See, e.g., Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 297 n.7, 91 S.Ct. 1909, 1923, 29 L.Ed.2d 473 (1971).

In summary, we affirm the district court's judgment that the union committed an unfair labor practice under § 8(b)(4)(A) by striking to obtain the arbitration clause (Article X) because it forced the association to act as a member of another employer organization. We also affirm the jury award of actual damages suffered by the asociation as a result of this unfair labor practice. We reverse the district court's holding that the state law claim for damages was not preempted and reverse the jury award of punitive damages.

AFFIRMED in part and REVERSED in part.

APPENDIX E

No. 79-2054

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

District Court Docket
No. CA 74-409-H

MOBILE MECHANICAL CONTRACTORS ASSOCIATION, INC.

Plaintiff-Appellee,

v.

EDWARD J. CARLOUGH, individually and as the representative of all members of the Sheet Metal Workers' International Association, *et al.*,

Defendants-Appellants.

Appeal From The United States District Court For The Southern District Of Alabama By Goldbold, Chief Judge, Tuttle And Hill, Circuit Judges

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JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court on this cause be and the same is hereby affirmed in part and reversed in part:

It is further ordered that each party bear their own costs on appeal to be taxed by the Clerk of this Court.

December 21, 1981.

Issued as mandate: January 25, 19[illegible]

APPENDIX F

Textof Article X, Section 8 of Standard form of Union Agreement:

"Section 8. In addition to the settlement of grievances arising our of interpretation or enforcement of this agreement as set forth in the preceding sections of this Article, any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this agreement shall be settled as hereinafter provided:

'(a) Should the negotiations for renewal of this agreement become deadlocked in the opinion of the Local Union or of the Local Contractors' Association, or both, notice to that effect shall be given to the office of the General President of Sheet Metal Workers' International Association and the national office of the Sheet Metal and Air Conditioning Contractors' National Association, Inc. If the General President of Sheet Metal Workers' International Association and the Chairman of the Labor Committee of Sheet Metal and Air Conditioning Contractors National Association believe the dispute might be adjusted without going to final hearing before the National Joint Adjustment Board, each will then designate a panel representative who shall proceed to the locale where the dispute exists as soon as convenient, attempt to conciliate the differences between the parties and bring about a mutually acceptable agreement. If such panel representatives or either of them conclude that they can not resolve the dispute, the parties thereto and the General President of Sheet Metal Workers' International Association and the national office of Sheet Metal and Air Conditioning Contractors' National Association shall be promptly so notified without recommendation from the panel representatives. Should the President of Sheet Metal Workers' International Association or the Chairman of the Labor Committee of Sheet Metal and Air Conditioning Contractors' National Association fail or decline to appoint a panel member or should notice of failure of the panel representatives to resolve the dispute be given, the parties shall promptly be notified so that either party may submit the dispute to the National Joint Adjustment Board. The dispute shall be submitted to the National Joint Adjustment Board pursuant to the rules as established and modified from time to time by the National Joint Adjustment Board. The unanimous decision of said Board shall be final and binding upon the parties, reduced to writing, signed and mailed to the parties as soon as possible after the decision has been reached. There

shall be no cessation of work by strike or lockout unless and until said Board fails to reach a unanimous decision and the parties have received written notification of its failure.

'(b) Any application to the National Joint Adjustment Board shall be upon forms prepared for that purpose subject to any changes which may be decided by the Board from time to time. The representatives of the parties who appear at the hearing will be given the opportunity to present oral argument and to answer any questions raised by members of the Board. Any briefs filed by either party including copies of pertinent exhibits will also be exchanged between the parties in advance of the hearing.

'(c) The National Joint Adjustment Board shall have the right to establish time limits which must be met with respect to each and every step or procedure contained in this section. In addition, the President of SMWIA and the Chairman of the National Labor Committee of SMACNA shall have the right to designate time limits which will be applicable to any particular case and any step therein which may be communicated to the parties by mail, telegram, or telephone notification.

'(d) Unless a different date is agreed upon mutually between the parties or is directed by the unanimous decision of the National Joint Adjustment Board, all effective dates in the new agreement shall be retroactive to the date immediately following the expiration date of the expiring agreement.' "

Opposition

NO. 81–1758

Office - Supreme Court, U.S.
FILED
APR 30 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

Petitioner,

versus

MOBILE MECHANICAL CONTRACTORS ASSOCIATION, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIS C. DARBY, JR.
Post Office Box 2565
Mobile, Alabama 36652
205–432–2635

ATTORNEY FOR RESPONDENT

QUESTION PRESENTED

Did the court of appeals err in concluding that a labor union violated Section 8 (b) (4) (A) of the National Labor Relations Act by striking a local employer association to force adoption of a "Standard Form of Union Agreement" covering substantially every facet of employer-employee relations and providing for interest arbitration of unresolved substantive terms by a national adjustment board, half of whose members are selected by the striking union and half by a national employer association to which the local employer association does not belong?

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STATUTES:

National Labor Relations Act, 29 U.S.C. Section 15 8 (b) (4) (A) 2, 3

MISCELLANEOUS:

House Conference Report No. 245, 93d Cong., 2d Sess., 591 2

STATEMENT OF THE CASE

The statement of the case of Petitioner Sheet Metal Workers International Association, AFL-CIO (Sheet Metal Workers) omits a salient fact. Both the district court [1] and the court of appeals found that an object of the strike was to require respondent Mobile Mechanical Contractors Association, Inc. (MMCA), [2] to "agree to [Sheet Metal Worker's] 'Standard Form of Union Agreement'." [3]

In addition to providing for interest arbitration by a panel selected by Sheet Metal Workers and the Sheet Metal and Air Conditioning Contractors' National Association, Inc., the Standard Form of Union Agreement applies to "all . . . work included in the jurisdictional claims of Sheet Metal Workers." The Standard Form of Union Agreement includes provisions pertaining to subcontracting, union security, regular workweek, overtime, holidays, reporting pay, minimum number of employees, hand tools, use of privately owned automobiles, selection and employment of apprentices, a grievance procedure which includes submission to a panel appointed by the president of the Sheet Metal Workers and the chairman of the Labor Relations Committee of the Sheet Metal and Air Conditioning Contractors' National Association, Inc., and contributions to the Sheet Metal and Air Conditioning Contractors' National Industry Fund of the United States and the National Training Fund for the Sheet Metal and Air Conditioning Industry. The Standard

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1/ Finding 33, Petitioner's Appendix at 12a—13a.

2/ MMCA is an Alabama membership corporation that represents employers in negotiating and administering collective bargaining agreements covering sheet metal workers, and plumbers and pipefitters in Mobile, Alabama and vicinity.

3/ Petitioner's Appendix at 46a.

Form of Union Agreement may be reopened "Whenever an amendment to the Standard Form of Union Agreement shall be adopted by the National Joint Labor Relations Adjustment Committee." (MMCA Exhibit 33, October 8, 1974; Appendix at 5 *infra)*

ARGUMENT

Section 8 (b) (4) (A) of the National Labor Relations Act (Act) was designed to outlaw involuntary industry-wide or multiemployer bargaining and its perceived evils including collusive stifling of competition and restraints of trade. H.R. No. 245, 93d Cong., 2d Sess., 591. The rationale adopted by the court of appeals is consistent with the decisions of other courts of appeal and the National Labor Relations Board (Board) in effecting the congressional objectives. In *United Mine Workers of America, Local 1854,* 238 NLRB 1583, *enf'd* 614 F.2d 872 (3d Cir. 1980), *rev'd on other grounds,* ____ U.S. ____, *rehearing denied,* ____ U.S. ____, the Board held that a strike to compel an employer, Amax, "to bargain as a member of" a multiemployer group violated section 8 (b) (4) (A) of the Act. 238 NLRB at 1587. In *Frito-Lay, Inc. v. Teamsters Local 37,* 623 F.2d 1354, (9th Cir. 1980), *cert. denied,* 449 U.S. 1013, 1112, the court held that a union violates section 8 (b) (4) (A) where the object of the strike is to force an employer "to engage in multi-employer bargaining, whether as a formal association or informal group." 623 F.2d at 1359.

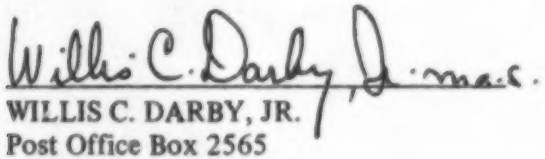
Here, the Standard Form of Union Agreement either provides the substantive terms of a complete collective bargaining agreement or establishes a framework for other substantive provisions by leaving blank spaces for words and figures to fix wages and hours. If the employer and the union cannot agree upon the words or figures to be inserted in the blanks, a person appointed by the Sheet Metal and Air Conditioning Contractors' National Association decides

what words or figures will fill in the blanks. MMCA, and the employers it represents, are thus forced into involuntary industry-wide bargaining through the Sheet Metal & Air Conditioning Contractors National Association, Inc., an employer organization - - the specific evil which Congress sought to eradicate through section 8 (b) (4) (A) of the Act.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,



WILLIS C. DARBY, JR.
Post Office Box 2565
Mobile, Alabama 36653

CERTIFICATE OF SERVICE

I, Willis C. Darby, Jr., one of the attorneys for Mobile Mechanical Contractors Association, Inc., respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of April 1982, I served copies of the foregoing BRIEF FOR THE RESPONDENT IN OPPOSITION on Sheet Metal Workers' International Association, AFL-CIO by mailing a copy in a duly addressed envelope, with postage prepaid, to its counsel, Donald W. Fisher, Esquire, 720 National Bank Building, Toledo, Ohio 43604.

Willis C. Darby, Jr. m.a.c.

WILLIS C. DARBY, JR.

Attorney for Mobile Mechanical
Contractors Association, Inc.
Post Office Box 2565
Mobile, Alabama 36652

Appendix

APPENDIX

STANDARD FORM OF UNION AGREEMENT

SHEET METAL, ROOFING, VENTILATING AND AIR CONDITIONING CONTRACTING DIVISIONS OF THE CONSTRUCTION INDUSTRY

Agreement entered into this _____ day of _____, 19 ___ by and between _____, hereinafter referred to as the Employer, and Local Union No. _____ of Sheet Metal Workers' International Association, hereinafter referred to as the Union for _____

_____

_____

_____

ARTICLE I

SECTION 1. This agreement covers the rates of pay, rules and working conditions of all employees of the employer engaged in but not limited to the (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or non-ferrous metal work of U.S. #10 guage or its equivalent or lighter gauge and all other materials used in lieu thereof and of all air-veyor systems and air handling systems regardless of material used including the setting of all equipment and all reinforcements in connection therewith; (b) all lagging over insulation and all duct lining; (c) testing and balancing of all air-handling equipment and duct work; (d) the preparation of all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches, and (e) all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.

ARTICLE II

SECTION 1. No Employer shall subcontract or assign any of the work described herein which is to be performed at a job site to any contractor, subcontractor or other person or party who fails to agree in writing to comply with the conditions of employment contained herein including, without limitations, those relating to union security, rates of pay and working conditions, hiring and other matters covered hereby for the duration of the project.

SECTION 2. Subject to other applicable provisions of this Agreement, the Employer agrees that when subcontracting for prefabrication of materials covered herein, such prefabrication shall be subcontracted to fabricators who pay their employees engaged in such fabrication not less than the prevailing wage for comparable sheet metal fabrication, as established under provisions of this Agreement.

ARTICLE III

SECTION 1. The Employer agrees that none but journeyman and apprentice sheet metal workers shall be employed on any work described in Article I.

ARTICLE IV

SECTION 1. The Union agrees to furnish upon request by the Employer, duly qualified journeyman and apprentice sheet metal workers in sufficient numbers as may be necessary to properly execute work contracted for by the Employer in the manner and under the conditions specified in this Agreement.

ARTICLE V

SECTION 1. The Employer agrees to require member-

ship in the Union, as a condition of continued employment of all employees performing any of the work specified in Article I of this Agreement, within eight (8) days following the beginning of such employment or the effective date of this Agreement, whichever is the later, provided the Employer has reasonable ground for believing that membership is available to such employees on the same terms and conditions generally applicable to other members and that membership is not denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fee uniformly required as a condition of acquiring or retaining membership.

SECTION 2. If during the term of this Agreement the Labor-Management Relations Act of 1947 shall be amended by Congress in such manner as to reduce the time within which an employee may be required to acquire union membership, such reduced time limit shall become immediately effective instead of and without regard to the time limit specified in Section 1 of this Article.

SECTION 3. THE provisions of this Article shall be deemed to be of no force and effect in any state, to the extent to which the making or enforcement of such provision is contrary to law. In any state where the making and enforcement of such provision is lawful only after compliance with certain conditions precedent, this Article shall be deemed to take effect as to involved employees immediately upon compliance with such conditions.

ARTICLE VI

SECTION 1. The regular working day shall consist of _____ (_____) hours labor in the shop or on the job, beginning with Monday and ending with Friday of each week. All full time or part time labor performed during such hours shall be recognized as regular working hours and

paid for at the regular hourly rate. Except as otherwise provided pursuant to Section 4 of this Article, all work performed outside the regular working hours and performed during the regular work, week, shall be at _____ (_____) times the regular rate.

Employees shall be at the shop or project site at scheduled starting time each day and shall remain until quitting time.

SECTION 2. New Year's Day, Decoration Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day _____ or days locally observed as such, and Saturday and Sunday shall be recognized as holidays. All work performed on holidays shall be paid as follows: _____
_____
_____.

SECTION 3. It is agreed that all work performed outside of regular working hours during the regular work week and on holidays shall be performed only upon notification by the Employer to the local union in advance of scheduling such work. Preference to overtime and holiday work shall be given to men on the job on a rotation basis so as to equalize such work as nearly as possible.

SECTION 4. Shift work and the pay and conditions therefor shall be only as provided in written addendum attached to this Agreement.

ARTICLE VII

SECTION 1. When employed in a shop or on a job within the limits of _____ employees shall be governed by the regular working hours specified herein and shall provide for themselves necessary transportation within

the said limits from home to shop or job at starting time and from shop or job to home at quitting time, and the Employer shall provide, or pay, for all necessary additional transportation during working hours.

SECTION 2. When employed outside of the limits specified in Section 1 of this Article, and within the jurisdiction of the Union, employees shall provide transportation for themselves which will assure their arrival at the limits specified in Section 1 of this Article at regular starting time, and the Employer shall provide or pay for all additional transportation for such jobs, including transportation from such job back to the limits specified in Section 1 of this Article which will assure arrival at such limits at quitting time. As an alternative to the foregoing method, travel expense may be paid by a zone or other method of payment. If this alternative method is used, it will be as provided in a written addendum attached hereto.

ARTICLE VIII

SECTION 1. The minimum rate of wages for journeymen sheet metal workers covered by this Agreement when employed in a shop or on a job within the jurisdiction of the Union to perform any work specified in Article I of this Agreement shall be $ _____ per hour, except as hereinafter specified in Section 2 of this Article.

SECTION 2. On all work specified in Article I of this Agreement, fabricated and/or assembled by journeymen sheet metal workers and/or apprentices within the jurisdiction of this Union, or elsewhere, for erection and/or installation within the jurisdiction of any other Local Union affiliated with Sheet Metal Workers' International Association, whose established wage scale is higher than the wage scale specified in this Agreement, the higher wage scale of the job site Union shall be paid to the journeymen employed on

such work in the home shop or sent to the job site.

SECTION 3. The provisions of Section 2 of this Article, Section 2 of Article II and Section 1 of Article III shall not be applicable to the manufacture for sale to the trade or purchase of the following items.

1. Ventilators
2. Louvers
3. Automatic and fire dampers
4. Radiator and air conditioning unit enclosures
5. Fabricated pipe and fittings for residential installations only
6. Mixing (attenuation) boxes
7. Plastic skylights
8. Air diffusers, grilles, registers
9. Sound attenuators

SECTION 4. The provisions of Section 2 of this Article shall not be applicable to the manufacture for sale to the trade or purchase of PLENUMS - - Double wall panels for use in construction of air housing, nor to AIR POLLUTION CONTROL SYSTEMS fabricated for the purpose of removing air pollutants, excluding air conditioning, heating and ventilating systems.

SECTION 5. Except as provided in Section 2 and 6 of this Article, the Employer agrees that journeymen sheet metal workers hired outside of the territorial jurisdiction

of this Agreement shall receive the wage scale and working conditions of the local Agreement covering the territory in which such work is performed or supervised.

SECTION 6. When the Employer has any work specified in Article I of this Agreement to be performed outside of the area covered by this Agreement and within the area covered by another Agreement with another union affiliated with the Sheet Metal Workers' International Association, and qualified sheet metal workers are available in such area, he may send no more than two (2) sheet metal workers per job into such area to perform any work which the Employer deems necessary, both of whom shall be from the employer's home jurisdiction. All additional sheet metal workers shall come from the area in which the work is to be performed. Journeymen sheet metal workers covered by this Agreement who are sent outside of the area covered by this Agreement shall be paid at least the established minimum wage scale specified in Section 1 of this Article but in no case less than the established wage scale of the local Agreement covering the territory in which such work is performed or supervised, plus all necessary transportation, travel time, board and expenses while employed in that area, and the Employer shall be otherwise governed by the established working conditions of that local Agreement. If employees are sent into an area where there is no local Agreement of the Sheet Metal Workers' International Association covering the area then the minimum conditions of the home local union shall apply.

SECTION 7. In applying the provisions of Section 2, 5, and 6 of this Article VIII, the term, "wage scale" shall include the value of all applicable hourly contractual benefits in addition to the hourly wage rate provided in said Sections.

SECTION 8. Welfare benefit contributions shall not be duplicated.

SECTION 9. Wages at the established rates specified herein shall be paid _____ in the shop or on the job at or before quitting time on _____ of each week, and no more than two (2) days' pay will be withheld. However, employees when discharged, shall be paid in full.

SECTION 10. Journeymen sheet metal workers who report for work by direction of the Employer and are not placed at work, shall be entitled to two (2) hours' pay at the established rate. This provision, however, shall not apply under conditions over which the Employer has no control.

SECTION 11. Each Employer covered by this Agreement shall employ at least one (1) journeyman sheet metal worker who is not a member of the firm on all work specified in Article I of this Agreement.

SECTION 12. The employer agrees to promote programs of industry education, training, administration of collective bargaining agreements, research and promotion, such programs serving to expand the market for the services of the Sheet Metal Industry, improve the technical and business skills of employers, stabilize and improve Employer-Union relations, and promote, support and improve the training and employment opportunities for employees. No part of these payments shall be used for political or anti-union activities.

The employer shall pay the Sheet Metal and Air Conditioning Contractors' National Industry Fund of the United States seven-tenths cents ($0.007) per hour for each hour worked on or after the effective date of this agreement by all employees of the employer covered by this agreement.

Effective July 1, 1971, said payment shall be one cent ($0.01) per hour for each hour worked and effective July 1, 1972, said payment shall be two cents ($0.02) per hour for each hour worked. Payment shall be made on or before the 20th day of the succeeding month, and shall be remitted to the Sheet Metal and Air Conditioning Contractors' National Industry Fund of the United States, 1611 North Kent Street, Arlington, Virginia 22209, or, for purposes of collection and transmittal, through _____ .

SECTION 13. The employer shall pay to the _____ _____ _____ cents ($_____) per hour for each hour worked on or after the effective date of this Agreement, by all employees of the employer covered by this Agreement.

Payment shall be made monthly on or before the twentieth day of the succeeding month.

SECTION 14. The employers will contribute to the National Training Fund for the Sheet Metal and Air Conditioning Industry two cents ($0.02) per hour for each hour worked on and after the effective date of this agreement by all employees of the employer covered by this agreement. Payment shall be made on or before the 20th day of the succeeding month and shall be remitted to the office of the National Training Fund as designated by the Trustees of the Fund, or for purposes of collection and transmittal through _____ . The parties agree to be bound by the Agreement and Declaration of Trust establishing said Fund and amendments thereto as may be made from time to time and hereby designate as their representatives on the Board of Trustees such Trustees as are named, together with any successors who may be appointed pursuant to said agreement.

ARTICLE IX

SECTION 1. Journeyman and apprentice sheet metal workers covered by this Agreement shall provide for themselves all necessary hand tools.

SECTION 2. Journeyman and apprentice sheet metal workers covered by this Agreement shall not be permitted or required as a condition of employment to furnish the use of automobile or other conveyance to transport men, tools, equipment or materials from shop to job, from job to job, or from job to shop; facilities for such transportation to be provided by the Employer. This provision shall not restrict the use of an automobile or other conveyance to transport its owner and personal tools from home to shop or job at starting time or from job to home at quitting time.

ARTICLE X

SECTION 1. Grievances of the Employer or the Union, arising out of interpretation or enforcement of this Agreement, shall be settled between the Employer directly involved and the duly authorized representative of the Union, if possible. An Employer may have the local Association present to act as his representative.

SECTION 2. Grievances not settled as provided in Section 1 of this Article may be appealed by either party to the Local Joint Adjustment Board in the area in which the work is performed and such Board shall meet promptly on a date mutually agreeable to the members of the Board, but in no case more than fourteen (14) calendar days following the request for its services, unless the time is extended by mutual agreement of the parties, to render a final and binding determination, except as provided in Section 3 and 5 of this Article. The Board shall consist of an equal number of representatives of the Union and of the local Employers'

Association and both sides shall cast an equal number of votes at each meeting. The local Employers' Association, on its own initiative, may submit grievances for determination by the Board as provided in this Section.

Notice of appeal to the Local Joint Adjustment Board shall be given within thirty (30) days after termination of the procedures prescribed in Section 1 of this Article, unless the time is extended by a mutual agreement of the parties.

SECTION 3. Grievances not disposed of under the procedure prescribed in Section 2 of this Article, because of a deadlock, or failure of such Board to act, may be appealed jointly or by either party to a Panel consisting of one (1) representative appointed by the General President of Sheet Metal Workers' International Association and one (1) representative appointed by the Chairman of the Labor Relations Committee of Sheet Metal and Air Conditioning Contractors' National Association, Inc. Appeals on behalf of employees shall be mailed to the General Secretary-Treasurer of the Sheet Metal Workers International Association and those on behalf of an employer mailed to the Secretary of the Labor Committee of the Sheet Metal and Air Conditioning Contractors' National Association, Inc. Joint appeals shall be mailed to the Secretaries of both Associations. Notice of appeal to the Panel shall be given within thirty (30) days after termination of the procedures prescribed in Section 2 of this Article. Such Panel shall meet promptly, but in no event more than fourteen (14) calendar days following receipt of such appeal, unless such time is extended by mutual agreement of the Panel members. Except in case of deadlock, the decision of the Panel shall be final and binding.

Notwithstanding the previsions of Paragraph 1 of this Section, a contractor who was not a party to the labor agreement of the area in which the work in dispute is per-

formed may appeal the decision of the Local Joint Adjustment Board, including a unanimous decision, and request a Panel hearing as set forth in Section 3 of this Article, providing such appeal is approved by both the Chairman of the Labor Relations Committee of Sheet Metal and Air Conditioning Contractors' National Association, Inc. and by the General President of Sheet Metal Workers' International Association.

SECTION 4. Grievances not settled as provided in Section 3 of this Article may be appealed jointly or by either party to the National Joint Adjustment Board, as established by the Sheet Metal Workers' International Association and the Sheet Metal and Air Conditioning Contractors' National Association, Inc. Submission shall be made and decisions rendered under such procedures as may be prescribed by such Board, from time to time, and mutually approved by the parties creating it. Copies of the procedures shall be available from, and submissions of grievances may be made to, either the General Secretary-Treasurer of Sheet Metal Workers' International Association or the Secretary of the Labor Committee of the Sheet Metal and Air Conditioning Contractors' National Association, Inc. Submissions on appeal to the National Joint Adjustment Board shall be made within thirty (30) days after termination of the procedures prescribed in Section 3 of this Article.

SECTION 5. A Local Joint Adjustment Board, Panel and the National Joint Adjustment Board are empowered to render such decisions and grant such relief to either party as they deem necessary and proper, including awards of damages or other compensation and, if it is believed warranted, to direct that the involved agreement and any other agreement or agreements between the employer and any other local union affiliated with the Sheet Metal Workers' International Association be cancelled, provided that

any decision of a Local Joint Adjustment Board directing cancellation of an agreement or agreements may be appealed by the affected employer or local union as a matter of right, directly to the National Joint Adjustment Board.

SECTION 6. In the event any party fails or refuses to comply with any decision of a Local Joint Adjustment Board or Panel, without appeal, or any decision of the National Joint Adjustment Board, within thirty (30) days after notice thereof, a Local Joint Adjustment Board, Panel, or any party to the dispute may, in addition to any other legal remedies which may be available to the parties, request the National Joint Adjustment Board to cancel the involved agreement and any other agreements between the involved employer and other local unions affiliated with Sheet Metal Workers' International Association. Unless otherwise decided by unanimous vote, the National Joint Adjustment Board shall cancel such agreements if it finds the involved party to be in non-compliance with the decision in question. Requests for the Board's services shall be made in the same manner and in the same form as other appeals to the National Joint Adjustment Board and the procedure followed shall be the same except that any intermediate step or steps shall be omitted and the request made directly to the National Joint Adjustment Board.

SECTION 7. Failure to exercise the right of appeal at any step thereof within the time limit provided therefor shall void any right of appeal applicable to the facts and remedies of the grievances involved. There shall be no cessation of work by strike or lockout during the pendency of the procedures provided for in this Article. Except in case of deadlock, the decision of the National Joint Adjustment Board shall be final and binding.

SECTION 8. In addition to the settlement of grievances arising out of interpretation or enforcement of this agree-

ment as set forth in the preceding sections of this Article, any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this agreement shall be settled as hereinafter provided:

(a) Should the negotiations for renewal of this agreement become deadlocked in the opinion of the Local Union or of the Local Contractors' Association, or both, notice to that effect shall be given to the office of the General President of Sheet Metal Workers' International Association and the national office of the Sheet Metal & Air Conditioning Contractors' National Association, Inc. If the General President of Sheet Metal Workers' International Association and the Chairman of the Labor Committee of Sheet Metal and Air Conditioning Contractors' National Association believe the dispute might be adjusted without going to final hearing before the National Joint Adjustment Board, each will then designate a panel representative who shall proceed to the locale where the dispute exists as soon as convenient, attempt to conciliate the differences between the parties and bring about a mutually acceptable agreement. If such panel representatives or either of them conclude that they can not resolve the dispute, the parties thereto and the General President of Sheet Metal Workers' International Association and the national office of Sheet Metal and Air Conditioning Contractors' National Association shall be promptly so notified without recommendation from the panel representatives. Should the President of Sheet Metal Workers' International Association or the Chairman of

the Labor Committee of Sheet Metal and Air Conditioning Contractors' National Association fail or decline to appoint a panel member or should notice of failure of the panel representatives to resolve the dispute be given, the parties shall promptly be notified so that either party may submit the dispute to the National Joint Adjustment Board. The dispute shall be submitted to the National Joint Adjustment Board pursuant to the rules as established and modified from time to time by the National Joint Adjustment Board. The unanimous decision of said Board shall be final and binding upon the parties, reduced to writing, signed and mailed to the parties as soon as possible after the decision has been reached. There shall be no cessation of work by strike or lockout unless and until said Board fails to reach a unanimous decision and the parties have received written notification of its failure.

(b) Any application to the National Joint Adjustment Board shall be upon forms prepared for that purpose subject to any changes which may be decided by the Board from time to time. The representatives of the parties who appear at the hearing will be given the opportunity to present oral argument and to answer any questions raised by members of the Board. Any briefs filed by either party including copies of pertinent exhibits will also be exchanged between the parties in advance of the hearing.

(c) The National Joint Adjustment Board shall have the right to establish time limits which must be met with respect to each and every step or procedure contained in this section. In addition, the President of SMWIA and the Chairman of the National Labor Committee of SMACNA shall have the right to designate time limits which will be applicable to any particular case and any step therein which may be communicated to the parties by mail, telegram, or telephone notification.

(d) Unless a different date is agreed upon mutually between the parties or is directed by the unanimous decision of the National Joint Adjustment Board, all effective dates in the new agreement shall be retroactive to the date immediately following the expiration date of the expiring agreement.

ARTICLE XI

SECTION 1. Agreements, national in scope, between Sheet Metal Workers' International Association and other International Unions, covering work jurisdiction and the assignment, allocation and division of work among employees represented for the purposes of collective bargaining by such labor organizations, shall be respected and applied by the Employer, provided such Agreements have been consummated with the knowledge of and without objection from Sheet Metal and Air Conditioning Contractors' National Association, Inc.

ARTICLE XII

SECTION 1. All duly qualified apprentices shall be

under the supervision and control of a Joint Apprentice Committee composed of six (6) members, three (3) of whom shall be selected by the Employer, and three (3) by the Union. Said Joint Apprentice Committee shall formulate and make operative such rules and regulations as they may deem necessary and which do not conflict with the specific terms of this Agreement, to govern eligibility, registration, education, transfer, wages, hours, working conditions of duly qualified apprentices and the operation of an adequate apprentice system to meet the needs and requirements of the trade. Said rules and regulations when formulated and adopted by the parties hereto shall be recognized as part of this Agreement.

SECTION 2. The Joint Apprentice Committee designated herein shall serve for the life of this Agreement, except that vacancies in said Joint Apprentice Committee caused by resignation or otherwise, may be filled by either party hereto, and it is hereby mutually agreed by both parties hereto, that they will individually and collectively cooperate to the extent that duly qualified apprentices be given every opportunity to secure proper technical and practical education experience in the trade, under the supervision of the Joint Apprentice Committee.

SECTION 3. It is hereby agreed that the Employer shall be entitled to apply to the Joint Apprentice Committee on the basis of one (1) apprentice for each four (4) Journeymen regularly employed throughout the year, and said ratio shall govern the consideration and granting of apprentices by the Joint Apprentice Committee.

SECTION 4. All applicants for apprenticeship shall be between the ages of seventeen (17) and twenty-three (23) years of age and each apprentice shall serve an apprenticeship of four (4) years and such apprentices shall not be put in charge of work on any job and shall work under the supervision of a journeyman until apprenticeship terms

have been completed and they have qualified as journeymen.

SECTION 5. A graduated wage scale for apprentices shall be established and maintained on the following percentage basis of the established wage rate of journeymen sheet metal workers:

First year - - First half 45% - - Second half 50%
Second year - - First half 55% - - Second half 60%
Third year - - First half 65% - - Second half 70%
Fourth year - - First half 75% - - Second half 80%

ARTICLE XIII

SECTION 1. This Agreement and Addenda Numbers _____ through _____ attached hereto shall become effective on the _____ day of _____, 19 ___, and remain in full force and effect until the _____ day of _____, 19 ___, and shall continue in force from year to year thereafter unless written notice of reopening is given not less than ninety (90) days prior to the expiration date. In the event such notice of reopening is served, this Agreement shall continue in force and effect until conferences relating thereto have been terminated by either party.

SECTION 2. Notwithstanding any other provision of this Article, or any other Article of this Agreement, whenever an amendment to the Standard Form of Union Agreement shall be adopted by the National Joint Labor Relations Adjustment Committee, any party to this Agreement, upon the service of notice to all other parties hereto, shall have this Agreement reopened thirty (30) days thereafter, for the sole and only purpose of attempting to negotiate such amendment or amendments into this Agreement for the duration of the term hereof. There shall be no strike or lock-

out over this issue.

In witness whereof, the parties hereto affix their signatures and seal this ____ day of _____, 19 ___.

_____ _____	Local Union No. _____
(Specify Name of Association or Contractor)	of Sheet Metal Workers' International Association
BY _____	BY _____
(Signature of Officer or Representative	(Signature of Officer or Representative
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

Petitioner's Reply Brief

NO. 81-1758

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

Petitioner,

vs.

MOBILE MECHANICAL CONTRACTORS ASSOCIATION, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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Attorney for Petitioner.

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PETITIONER'S REPLY BRIEF

In its brief in opposition, MMCA seeks to divert attention from the §303 issue involving the misinterpretation of the language of §8(b)(4)(A) by commenting on the fact that Petitioner and Local Union 441 were striking over a number of contract demands in addition to Article X, Section 8. This is true but irrelevant.

The Petition is concerned with the §303 claim in the complaint which, in turn, is concerned solely with the demand for Article X, Section 8. The court of appeals' decision makes this very clear. Petition, App. D, pp. 49a-50a.

The basic issue in the Petition, distilled to its essence, is whether the phrase in §8(b)(4)(A) of the Act "to join any labor or employer organization" means belonging to such organization in the sense of becoming a member by complying with rules or requirements pertaining thereto or whether it is sufficiently elastic to include the vague and much broader concept of acting as if one belonged to or were a member of the organization.

Resolution of this issue is a matter of utmost importance in the field of federal labor law, as the facts in the instant case illustrate. Petitioner

in 1974 participated in an unsuccessful but peaceful economic strike that had as one of its objects forcing or requiring MMCA to adopt an interest arbitration clause that would have required it -- and Petitioner's affiliate, Local Union 441, as well -- to arbitrate deadlocked contract-negotiation issues before the NJAB,[1/] a private bi-partite tribunal, half of whose members are selected by Petitioner and half by SMACNA,[2/] a national employer organization with which MMCA is not affiliated.

Neither Petitioner nor Local Union 441 attempted to force or require MMCA to apply for membership in SMACNA or to pay dues or make payments of any sort to that employer organization. Nor did they, or either of them, attempt to

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1/ Refers to National Joint Adjustment Board for the Sheet Metal Industry.

2/ Refers to Sheet Metal and Air Conditioning Contractors National Association, Inc.

force or require MMCA or any of its employer members to use or display a SMACNA logo or other identifying mark on its stationery, signs, trucks, or other property or to represent or hold out to the public in any fashion that they belonged to or were members of SMACNA. The only demand made, in short, was that MMCA use the services of the NJAB in one limited eventuality, i.e., if and when future contract negotiations with Local Union 441 reached impasse.

The court of appeals below characterized the Article X, Section 8, demand backed by the economic strike as tantamount to forcing MMCA "to act as if it were a member" of the national employer association. Petition, App. D, p.53a. It then held that the strike in support of this demand was illegal because "§8(b)(4)(A) prohibits union efforts to compel an employer to join an

employer organization" and "also prohibits union efforts to compel an employer to act as if it were a member of an employer association." Petition, App. D, p. 51a.

This overbroad interpretation of the critical statutory language is of grave concern to Petitioner and labor unions generally because §8(b)(4)(A) not only defines proscribed conduct that is remedied through administrative proceedings before the National Labor Relations Board but, through its analogue §303, imposes monetary liability for damages proximately caused by labor unions that engage in such activities. The result reached in the instant case: a $17,000.00 jury verdict, aptly demonstrates the financial jeopardy involved. Accordingly, the need for prompt correction of the lower court's definitional error can hardly be exaggerated.

The key words "to join" should be interpreted in their standard restrictive sense, it is submitted, because that is most consistent with the meaning normally ascribed to them in common parlance by individuals in all walks of life, including members of Congress. If Congress had intended to proscribe union attempts to coerce employers to act as if they were members of or belonged to labor or employer organizations, the legislators surely would have selected phraseology adapted fairly to convey such intention. The labor unions whose activities were being severely restricted under §8(b)(4)(A), and whose treasuries were being placed in jeopardy under §303, were entitled to, and, consequently, Congress undoubtedly would have afforded them, a more forthright warning if the statutory prohibition was meant to be substantially more inclusive

than is signaled by use of an extremely pedestrian phrase that ordinarily connotes actual but not fictitious or simulated membership in an organization.

CONCLUSION

The petition for writ of certiorari should be granted to resolve the urgent and vitally important issue raised herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 1982, three (3) copies of Petitioner's Reply Brief were placed in the United States Mail with first-class postage prepaid to: Mr. Willis C. Darby, Jr., Attorney for Respondent, P. O. Box 2565, Mobile, Alabama 36601.

Donald W. Fisher